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JUDICIAL REVIEW OF VETERANS' AFFAIRS

HEARING

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS
HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

SECOND SESSION

SEPTEMBER 8, 1988

Printed for the use of the Committee on Veterans' Affairs

Serial No. 100-60

U.S. GOVERNMENT PRINTING OFFICE
89-861 ⇉ WASHINGTON : 1988

H761-2

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JUDICIAL REVIEW OF VETERANS' AFFAIRS

THURSDAY, SEPTEMBER 8, 1988

U.S. House of Representatives,
Committee on Veterans' Affairs,
Washington, D.C.

The committee met, pursuant to notice, at 9:30 a.m., in room 334, Cannon House Office Building, Hon. G.V. (Sonny) Montgomery (chairman of the committee) presiding.

Present: Representatives Montgomery, Edwards, Applegate, Evans, Kaptur, Penny, Staggers, Rowland of Georgia, Bryant, Florio, Stenholm, Harris, Kennedy, Patterson, Johnson, Jontz, Solomon, Hammerschmidt, Wylie, Stump, McEwen, Smith of New Jersey, Burton, Bilirakis, Ridge, Rowland of Connecticut, and Smith of New Hampshire.

OPENING STATEMENT OF CHAIRMAN MONTGOMERY

The Chairman. Good morning. Come to order, please. It seems like we just left here. We were here until 8 p.m. last night talking about hospital care, and I appreciate those members who were here last night being here this morning. I appreciate the other members being here, too.

In May and June of 1986, this committee held four days of hearings on H.R. 585, relating to judicial review of veterans' claims. During those hearings we heard testimony from almost 30 witnesses representing many organizations. Following those hearings, I scheduled a markup of the bill, and the committee voted not to bring the measure before the House. Many veterans' organizations opposed judicial review at that time. However, based on recent Senate hearings on S. 11, it appears that most organizations now support some form of judicial review.

The hearing today will give us an opportunity to hear from a variety of witnesses on four bills, H.R. 639, introduced by Lane Evans; H.R. 5039, introduced on behalf of the American Legion; S. 2292, introduced by Senator Murkowski; and S. 11, introduced by Senator Cranston, which has passed the Senate.

Organizations which are unable to present their personal testimony will have their statements included as part of the hearing record.

I would like to repeat to my colleagues what I said the last time this committee met to consider judicial review legislation in 1986. Following those hearings, I said that I would continue to have an open mind on the issue of judicial review. I still feel the same way. I further stated, that should the veterans' organizations come to some consensus on the issue, maybe something could be worked out. Even though some of the media have created the impression that I have blocked legislation from being considered in this committee, that is not the case. I am not persuaded, however, that factual decisions on veterans' claims should be subject to judicial review in the Federal courts, but I am hopeful that some compromise can be reached. I hope that this hearing will allow us to explore some middle ground. I urge all the members to keep an open mind, ask questions, and weigh the witnesses' experience and expertise on this subject matter.

Now I would like to yield to the distinguished ranking minority member of the committee, Jerry Solomon, who stayed with us until late into the evening last night.

OPENING STATEMENT OF HON. GERALD B.H. SOLOMON

Mr. SOLOMON. Thank you, Mr. Chairman. I do commend you for calling this hearing on these judicial review bills of the House and the Senate. We have seen movement among several veterans' organizations on such legislation, and we may be much closer to a reasonable degree of consensus about what should be done in terms of specific proposals.

Mr. Chairman, while your concerns and mine about judicial review are a matter of record, I believe that our intentions and motivations may have been misunderstood, and in some quarters perhaps even misrepresented. Because this committee has been unwilling to drive a wedge into the veterans' community over this particular issue, we and particularly you, Mr. Chairman, have been subjected to some irresponsible and I think unfair criticism. Yet, to your great credit, you have kept your dignity, held a steady course, and declined to be stampeded into anything. I think that is a tribute to you, Mr. Chairman. If it is to be done, I think that judicial review of veterans' claims is too important an issue to do with something wrong. Veterans will have to live with the results for a long, long time.

None of the bills is a panacea, and I think that some proponents of judicial review have oversold it to the point that if it finally arrives, it may be a disappointment. Nonetheless, we are here to approach the subject constructively, just as we have in previous hearings. I certainly look forward to the testimonies this morning, and I hope that we can come to some kind of consensus.

Thank you Mr. Chairman.

The CHAIRMAN. Thank you.

Our first witness today is Judge Morris Arnold from the United States District Court for the Western District of Arkansas. Judge Arnold is appearing today on behalf of the Judicial Conference of the United States. With Judge Arnold is Christy Massie, counsel to the Legislation and Public Affairs Office of the United States Courts. Following Judge Arnold's remarks, Ms. Massie will briefly summarize the views of Judge Stephen Breyer who sits on the U.S. Court of Appeals for the First Federal Circuit Court. Judge Breyer recently testified before the Senate Veterans' Affairs Committee on S. 11.

Before calling on John Paul Hammerschmidt, who is a very close friend of Judge Arnold's, and who I would like to have tell us everything about Judge Arnold, I believe that Lane Evans, who is a member of the full committee and chairman of the Subcommittee on Investigation and Oversight would like to make a comment.

OPENING STATEMENT OF HON. LANE EVANS

Mr. **Evans**. Thank you Mr. Chairman, I will try to keep my remarks brief. I want to thank you for calling this hearing on judicial review for our veterans.

One current Veterans' Administration problem is that we have a fundamental flaw. VA decisions which go against the veteran are not subject to any kind of independent review. Veterans do not have the basic right to due process in their dealing with agency decisions. I believe that veterans should be allowed to have their day in court. Social Security recipients, Federal prisoners, and undocumented foreign workers can challenge agency decisions, but veterans are stuck with VA rulings that have no chance of outside review. A decision by the VA to reject a veteran's claim for compensation is final. The VA and only the VA can review a VA decision. Why should anyone fear providing the veterans of our country with an option of seeking an independent review of a negative or arbitrary decision?

In addition, current law prevents veterans from paying any attorney more than $10 for handling a VA claim. This is a paternalistic rule left over from the bygone days when $10 was a lot of money. Veterans favor changing the current system by a margin of three to one in public opinion polls. Support is consistent for all ages and all major demographic groups. Like most veterans' matters, this is a non-partisan issue. H.R. 639, which I have introduced has garnered 149 House co-sponsors, Republican and Democratic alike. It would allow veterans a court review of their claims with legal counsel. I deeply believe that our veterans who have sacrificed so much are entitled to this fundamental protection.

Due to time constraints, I would like to submit written testimony from Congressman Dave Bonior, Congressman Tony Coelho, and Congressman Leon Panetta in support of this critical legislation, to be entered into the record, Mr. Chairman.

The **Chairman**. Without objection, so ordered.

[The statements appear on pp. 180, 182 and 184.]

Mr. **Florio**. I also have a statement that I would like to have entered into the record, Mr. Chairman, and I agree with Mr. Evans.

The **Chairman**. Without objection, so ordered. I appreciate the gentleman doing that. It does help us out because I know we are going to get a vote at 10:05 and then we will start taking up those amendments. There are time limits on the amendments.

The Chair will do the best he can to move it along and to have a fair hearing where everyone will get to say their piece.

[The statement of Mr. Florio appears on p. 190.]

The **Chairman**. Are there any other comments?

[No resonse.]

The **Chairman**. If there are no further comments, I want to yield to John Paul Hammerschmidt, the former ranking minority member of the Veterans' Affairs Committee.

OPENING STATEMENT OF HON. JOHN PAUL HAMMERSCHMIDT

Mr. HAMMERSCHMIDT. Thank you very much, Mr. Chairman. We have seen much in the press this year about the issue of judicial review of veterans' claims, and needless to say, many of these articles and editorials have treated this complex issue in an overly simplistic and one-sided manner. In the past I opposed judicial review legislation as envisioned by S. 11.

Mr. Chairman, I would also note that the judicial branch of our government, the branch that would implement judicial review, strongly opposes S. 11. The views of our Federal judges on judicial review have been largely ignored, yet who is better qualified to address it? I am very pleased that we have the testimony of the Judicial Conference on this measure. The Judicial Conference, chaired by the Chief Justice of the United States, is composed of judges from around the country who represent each level of the courts.

Now I am honored to introduce Dr. Morris (Buzz) Arnold, a United States District Judge, a fellow Arkansan, and a close personal friend. Judge Arnold has had a most distinguished academic career. He is a nationally known legal scholar. He holds a Bachelor of Science degree in electrical engineering and a Bachelor of Law from the University of Arkansas, where he was Editor in Chief of the "Law Review." In fact, he was the highest ranking graduate in the U. of A. School of Law in 1968. He also has a Master's and a Doctorate in law from Harvard University, where he won the coveted Frank Knox Memorial Fellow Award to study at the University of London. Dr. Arnold has also taught law at several prominent universities and was Dean of the Indiana University's Bloomington School of Law immediately prior to being appointed to the Federal bench, where he has served with great distinction.

Mr. Chairman, it is with great pleasure that I introduce to the members of this committee Dr. Morris (Buzz) Arnold.

STATEMENT OF JUDGE MORRIS S. ARNOLD, ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES; ACCOMPANIED BY CHRISTY MASSIE, COUNSEL TO THE LEGISLATIVE AND PUBLIC AFFAIRS, OFFICE OF THE UNITED STATES COURTS

Judge ARNOLD. Thank you very much, Congressman Hammerschmidt, for that very generous introduction.

Mr. Chairman, ladies and gentlemen of the committee, thank you for providing this forum for our co-equal branch of the government. It is not common for me these days to be on this side of the table, and I think that I will carry home with me something more of an appreciation for what it is like for witnesses to be in my court when I go home. I suppose that much of what goes on in this room is educational in any event, so I appreciate this opportunity to be educated.

I do represent the Judicial Conference of the United States, which is a body created by you all, that is by the Congress of the United States, whose job it is to be essentially the administrative arm of the judicial branch. It is a kind of an agency in the judicial branch and it has an agency that serves it, namely the Administrative Office of the Courts.

I am fortunate today to have with me Ms. Christy Massie, who is Counsel to the Office of Legislative and Public Affairs of the Administrative Office of the United States Courts, who will be testifying on behalf of Judge Breyer of the First Circuit Court of Appeals. He was unable to be here today.

The Judicial Conference of the United States has asked me to indicate to you its opposition to judicial review of veterans' claims, not obviously on any lack of regard for veterans or indeed for any class of persons who receive governmental benefits, but based rather on two main concerns which the Judicial Conference has asked me to voice here briefly today.

First of all, we are concerned about the amount of resources that are likely to have to be devoted to an enterprise of this sort. We are very concerned that our requests for judgeships since 1980 have been largely left unfilled. We think that the requests that we have made are realistic. We certainly have made them in good faith. The truth is that I believe that in many of our districts today we are on the brink of not providing an adequate judicial system for the people of the United States, and I think that would be a great shame because I believe that the judicial system has been, over the years and in the main, one of the greatest achievements of the government of the United States. I would hate very much to see the judiciary burdened any further in a way that would detract from the kind of quantity and quality of service which the people of the United States deserve.

Our estimate is that if one version or another of "judicial review" is enacted with respect to veterans' benefits, that it would likely require something in the nature of 11 or 12 new district judges and perhaps 2 or 3 circuit judges, simply to deal with the increased case load. Obviously this is an estimate which is rough, because we do not know exactly how many of these kinds of appeals would in fact ultimately find their way into our courts, but we think this is a rather conservative estimate.

If we do not get any increased resources—and I must say with great respect that we don't have any confidence that we will get increased resources, since our requests for such resources have not been filled for the last eight years, no doubt for reasons that appear and perhaps are meritorious to the Congress of the United States—if we do not get increased resources, what will happen is that the service of the courts to the people will deteriorate. We are not afraid of more work. The truth is that we probably can not work any harder than we are already working, so if these cases do come into our courts one of two things will happen, or both.

One is that we will not give as much time as we presently do to some of the cases that we are adjudicating, and I frankly, speaking for myself, think that I am already giving some cases much too short a shrift. And, or in addition, the other thing that might happen is that we would simply get farther and farther behind than we already are. In my district we are in reasonably good shape, but I know that there are some districts in this country where you can barely get a civil trial setting because the Speedy Trial Act requires that criminal cases be given first attention. In some of our districts, almost no civil cases are tried because there are so many criminal cases that have priority on the docket. We simply can not get to them. I think that either of those two alternatives, and certainly the two alternatives in combination, would be a great pity. We simply can not allow the judiciary to deteriorate any further. I do not mean to seem alarmist, but I do think that it is a matter of some grave concern. In some of our circuits I know because the chief judges have told me, that the litigation explosion has reached crisis proportions.

Secondly, even if the resources were forthcoming, or even if some accommodation could be made to allow for this influx of new cases into our courts, we wonder because of our experience in the past whether Federal courts are very good at fact-finding, in the first place, and in particular, at this kind of fact-finding. The general business of the judiciary, as you know, is the individual adjudication of rights on a case-by-case basis and not the routine administration of justice. It is probably right to say that the experience of the Federal courts with respect to Social Security, a very similar kind of benefits to the ones that we are considering here today, does not raise one's confidence with respect to the quality of result. I do not mean to say that the courts have not done a good job, but I guess that what I am saying is this: probably, the contribution that the courts have made to doing a good job with respect to Social Security cases, probably does not outweigh the cost to the courts and therefore to the American people of providing that service.

I notice that with respect to the fact-finding function that is to be delegated by these proposed bills to the courts of the United States, there seems to be a difference of opinion as to what the standard ought to be. Let me note that in S. 11 a reversal would not result unless the district court were to find that a fact-finding was so utterly lacking in a rational basis in the evidence, that a manifest and grievous injustice would result if such finding were not set aside. I can not conceive of a fact-finding that could not survive this standard. You may say that in that case, hardly anybody will appeal, but I doubt that, knowing lawyers as well as I do, especially since the fee provisions of the bill, in S. 11 at least, do not depend for their triggering upon actually winning the appeal. In other words, attorneys' fees could be awarded even if the appeal were lost.

The standard of review—by the way this is a standard of review that I do not think has ever been proposed in the history of Anglo-American jurisprudence. I do not believe that it has a precedent. That does not mean that it is a bad idea, necessarily, but I do think that it does call into question the standard and signals that some caution ought to be used before the standard is adopted. The standard that is provided in H.R. 639, namely that the finding of facts be arbitrary, capricious, or an abusive discretion before the district court would be allowed to reverse that finding is, of course, more familiar to those of us who have studied administrative law. I wonder, however, in closing, with respect to this standard, whether a fee might not nevertheless be collectible by an attorney, even if he were to lose an appeal for a veteran, on the ground that the finding of fact was not arbitrary. Because, even though it is not arbitrary, it might nevertheless be that the position of the administrator was not substantially justified. It seems to me that those are two different standards.

That raised two difficulties in my mind, Mr. Chairman. The first is that I think that this language is likely to create a lot of confusion in the circuits. I can already see splits in circuits developing and I am wondering if the Supreme Court of the United States is going to want to take the time to resolve those disputes, and if it does not, of course, we will then have non-uniformity in the law of veterans' benefits, which is something that we simply do not need. The second thing is this: I wonder also if most of these cases will not be coming down in the district court to an adjudication, not really of any real dispute between a veteran and the agency, but rather as a question of whether the lawyer is going to get his or her fees. I think that would basically be a waste of time for the courts of the United States, and I would ask caution in adopting at least this portion of the bill.

I thank you very much indeed for your time and attention.

[The prepared statement of Judge Arnold appears on p. 192.]

The CHAIRMAN. Thank you very much, Judge Arnold.

What I think the Chair will do is to recognize Ms. Christy Massie to give the statement of Judge Breyer, and then Judge, we will have you on the witness stand and see how you survive.

Go ahead, Ms. Massie.

STATEMENT OF MS. CHRISTY MASSIE, COUNSEL TO THE OFFICE OF LEGISLATIVE AND PUBLIC AFFAIRS OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ON BEHALF OF JUDGE STEPHEN G. BREYER, FIRST CIRCUIT COURT OF APPEALS

Ms. MASSIE. Judge Arnold spoke specifically from the point of view of a district judge. Judge Breyer wanted some of his points made because he is a court of appeals judge, and this would give you some sort of an idea as to how both the trial judge and the appellate judge feel. Judge Breyer is particularly knowledgeable in this area. He is author of a textbook on administrative law that is used in quite a few law schools. He taught administrative law at the Kennedy School of Government at Harvard, and he was also Special Counsel to the Senate Judiciary Committee on Administrative Practice, and under Senator Kennedy, he was Chief Counsel of the Senate Judiciary Committee, so he dealt with this matter quite frequently.

His first point is that our opposition and his opposition has nothing to do with the rights of veterans, it is not meant to disparage veterans, and it has nothing to do with a so-called right to go to court. We are opposed, primarily, due to its impact on the judiciary, and our feeling that there is a better way to meet the needs of veterans that is less expensive, less fraught with delay, more adequately done, and more uniformly done.

His second point is that veterans' problems are just as important as Social Security problems. You should know that we also oppose second-guessing any administrative decisions and prefer that they be sent through an Article I Court or left with the Board of Veterans' Appeals.

Judge Breyer's third point is that the conference's position rests in part on the fact that courts are not particularly good at reviewing agency fact-finding. Administrative agencies were first set up because the courts were not handling the facts-basis for proceedings very well.

The courts were not expert on individual technical proceedings. They do not know how to set the burdens of proof to deal with factual matters and they reached different results in different parts of the country. Therefore, Congress set up administrative agencies back in the late 1800's to become expert in such matters, to set out the burdens of proof, and to insure uniformity. Just remember that Congress created agencies in the first place because they thought that the courts were not doing a very good job of this kind of thing.

Judge Breyer states that he knows that reviewing agency fact-finding is something that he does not do very well, and he has experience with this because of the Social Security experience. He has dealt with many Social Security cases. He hopes that we do not have additional work of a sort that other institutions do comparatively better.

He writes about 60 opinions per year, five to fifteen pages in the Federal Reporter. He asks that you divide that by the number of his working weeks. He hears oral arguments and reads at least 18 sets of briefs each month. He has maybe three weeks left in some months to do six or more real opinions. Now that might not sound like much, but you have to remember that this is five to fifteen pages and these are full length opinions, not just summary opinions. If Congress increases his work load, he is still going to spend the same amount of time writing decisions, but he will write one-day or half-day opinions. It takes three to four days to write a very good opinion, preferably a week. He says if you want us to do half-day or one-day opinions, the quality is going to deteriorate to a great degree.

Judge Breyer addressed the deterioration of opinions based on the increase in our work load at a conference in Williamsburg, and he asked that I submit his remarks there for the record.

The **Chairman**. Without objection, so ordered.

[The information appears on p. 241.]

Ms. **Massie**. Judge Breyer's fifth point is that there are other ways of dealing with the veterans' problem. He does not know the extent to which you have considered the other areas, but he hopes that you are at least aware of them. There are proposals to allow review of questions of interpretation of constitutional and statutory law. We have attached such an amendment to our testimony that would provide just review of questions of constitutional and statutory law.

There have also been proposals for independent Article I Social Security and/or VA courts. This is the way he would prefer to go, to set up some sort of mechanism so that all administrative issues can go through an Article I Court, provided that these courts are independent and not under the control of the agency.

He has also looked through Senator Murkowski's bill and has some drafting problems with Senator Murkowski's bill. I will not go into those now, but I will enter those for the record.

The **Chairman**. Without objection, so ordered.

[The information appears on p. 257.]

Ms. **Massie**. He also indicates that there are serious drafting problems with S. 11 and H.R. 639. You seem to have written a standard of review that a veteran would find virtually impossible to meet in S. 11 and one that would put too many cases in the court in H.R. 639. The bills also say that the courts are to award attorneys' fees even when the veteran loses. Courts of appeal find it difficult to determine the amounts of any contested issues, including attorneys' fees and facts. They are not set up for conducting hearings and in only 16 percent of the cases in Social Security do they even hear oral arguments.

Judge Breyer worries that S. 11 and H.R. 639 would have the courts spend their time trying to award attorneys' fees in cases where the veteran could not meet the virtually impossible standard of review, rather than doing what he suspects you want them to do, which is review veterans' claims.

Thank you very much, Mr. Chairman.

The **Chairman**. Thank you very much.

The Chair will only ask one question. I will ask this of you, Judge Arnold.

One of the witnesses that will follow you, Judge Arnold, is very critical of the idea of the Article I Court. Citing the American Bar Association as his source, he says that Article I Courts are not a good idea because—and these are the reasons that it's not a good idea—they are inconvenient to people who would use them, the quality of the judges that sit on these courts is not as high as it should be, Article I judges lose sight of the big picture and develop tunnel-vision, and they tend to approach cases in the same manner and are less democratic in nature than district courts. Now what are your comments on these ideas, Judge Arnold.

Judge **Arnold**. I think first of all, Mr. Chairman, that it is probably wrong to say that the American Bar Association opposes in every respect and in every instance the Article I Courts. I think they have raised a series of concerns about some Article I Courts. Tax Court, for instance, is an Article I Court and it is not inconvenient to litigants because I believe that it has sat in as many as 80 different cities in the United States, which is almost every district. So I do not think that there is any necessarily substantial inconvenience associated with an Article I Court. It would depend on the statutes that created it, whose job it would be to determine where those courts ought to sit. I think the inconvenience objection is insubstantial.

As far as the quality of the judges is concerned, I must say that I disagree that the quality of the judges in Article I Courts is somehow inferior, and I think that they would be surprised to hear that was the case. We have a lot of adjunct judges, for instance, who are frequently confused with Article I judges, who are not, but nevertheless they do similar kinds of work. The bankruptcy courts come to mind immediately, and the bankruptcy judges are a hard-working, efficient, and effective bunch of people. That is true of most of the Article I judges as well, as it is true of most, if not all, of the Article III judges.

I think that tunnel-vision is perhaps something of a danger, though I think that it is offset by the expertise that people develop by concentrating on certain kinds of areas in a way that a district court would simply be unable to do. I think that after a number of months and years of experience with these kinds of matters, a specialized Article I tribunal would have two advantages. The first is that it would be right more often than the district courts, because they would have more experience at dealing with these kinds of matters. Secondly, it would provide a kind of uniformity that the district courts would simply be unable, in my opinion, to provide in this area.

The CHAIRMAN. Thank you very much.

Ms. MASSIE. Mr. Chairman, if I might add something briefly. In Washington and sitting around the country as well is the Court of Claims. It is an Article I Court with appeals into the Court of Appeals for the Federal Circuit. They do government contract cases, and just last year this Congress gave to this court jurisdiction over benefits dealing with childhood vaccine compensation, so that would not hold true that Congress has never given specialized jurisdiction.

The CHAIRMAN. Thank you very much.

What the Chair would like to do is to recognize Mr. Solomon, and we will go for 5 minutes and then we will recess for 10 minutes while we vote.

If you will stay, Judge, and Ms. Massie, there are a number of questions we would like to ask you.

Jerry Solomon?

Mr. SOLOMON. Thank you, Mr. Chairman. I will not take much time.

I have had the opportunity, Judge Arnold and Ms. Massie, to read your written testimonies, and I am very impressed with them. The positions taken in the entire testimony, I think, pretty much track a consensus of the major veterans' organizations and perhaps also, the feeling of most members of this committee. Certainly, your expertise in the area is very helpful to us.

I think, Judge Arnold, your last statements, which you also have in your statement on page 30, where you talk about more experience and more uniformity in the Article I executive branch courts, really makes a lot of sense. The last thing we want to do is to expand the bureaucracy. We want to try to get results, and I think that your testimony certainly backs that up. I just want to thank both of you very much for your help in this matter.

Thank you.

Ms. MASSIE. Thank you.

Judge ARNOLD. Thank you, Congressman.

The CHAIRMAN. Thank you, Jerry.

Lane Evans?

Mr. EVANS. Thank you, Mr. Chairman.

Judge, the military correction boards and discharge review boards have been subject to judicial review for many years. Are you aware of any problems that have been created for the Federal courts as a result of allowing them judicial review?

Judge ARNOLD. I have no knowledge of that specific route of appeal. I would be glad to provide such comment as you might require if you give me a few days to do some investigation.

Mr. EVANS. You are not aware of any problems offhand?

Judge Arnold. No sir. I am just not aware of that particular avenue of appeal, as I said. I am not saying that there are no problems or that there are. I just do not know the answer to that.

Ms. Massie. Congressman, I would like to add something dealing with those. Those courts would seem to go more toward an Article I Court in their jurisdiction because they are very specialized courts. They take only one type of jurisdiction and they become expert in it. Their fact-finding is more specialized than general.

Mr. Evans. Since we are talking about specialty courts, isn't there a problem with specialty courts in the fact of attorneys with specialty bars that are created? The judge talked about the lack or the availability of access. Is it not a fact, however, that there are fewer attorneys that practice before these courts generally? Doesn't that mean that there is a specialty bar created and that I would assume they could charge higher fees because there is a specialty bar created?

Judge Arnold. That is not always the case, Congressman. I am sure that it does happen. The question of fees, of course, could be regulated by statute.

Ms. Massie. I think you will find that most of the trial associations like the American Trial Lawyers Association have specialized bars in all subject matters.

Mr. Evans. Are you aware of current litigation alleging improper practices at the Board of Veterans' Appeals, where the Board has been alleged to have based members bonuses on numbers of cases handled, handled cases differently where certain members of Congress have made inquiries, and routinely, or at least in certain cases, board members signed off on cases they had not reviewed? If any of those allegations were true, what would be your reaction in terms of the need for an independent review of veterans' decisions?

Judge Arnold. I have read reports along that line. Of course, I have no personal knowledge of it.

Mr. Evans. I am asking that if any of these were true, what would be your reaction in terms of the independence of the Board of Veterans' Appeals?

Judge Arnold. As a citizen I would say that is a matter that Congress ought to examine. As a representative of the Judicial Conference of the United States, I would say that I do not think that judicial review of these matters would necessarily cure—

Mr. Florio. Would the gentleman yield?

Mr. Evans. Yes.

Mr. Florio. Judge, couldn't you conceive of a situation where any of those things that were described reached to the level of being arbitrary and capricious? Someone who renders a decision on something they have not read—wouldn't that be conceivably—

Judge Arnold. Certainly.

Mr. Florio. And wouldn't that be an appropriate function of the court to make that determination?

Judge Arnold. Certainly. On the other hand, the question would not be whether this particular judge in arriving at his decision acted arbitrarily or capriciously, that is an administrative judge. The question would be whether the decision itself could not have been reached except by some arbitrary or capricious means.

Mr. Florio. And if that determination was made, obviously the veteran who was involved, if he did not have the appeal process, would be denied opportunity for due process. This type of approach would provide to that veteran a new hearing and an opportunity to get due process.

Judge Arnold. That's right. That would also be true is there were a specialized Article I tribunal doing the same job.

Mr. Evans. Mr. Chairman, I have more questions—

The Chairman. Why don't you go ahead and get your time in and them we will recess right after you finish.

Mr. Evans. I would like to deal with case load for a second. Are you aware that since 1980 over 250,000 lawsuits have been filed in Federal courts by the Veterans' Administration *against* veterans of our country? In fact, one district court judge summarized the situation in his jurisdiction by saying that almost half of the civil cases filed in his division, the Western Division of North Carolina, in the first half of 1983 were lawsuits filed by the government against a veteran to recover money allegedly owed to the VA. The court is not aware of any case in which the veteran had been represented by a lawyer. Maybe a part of our problem here in terms of your work load is the fact that the VA had a right to go to Federal court, and on a factual basis may sue a veteran. As it turns out, the veteran himself can not even effectively be represented by an attorney or even pose a defense to his case. I guess my question is directed to your case load and also to the fact that the VA can sue the veterans of this country in overpayment cases.

Judge Arnold. I am not aware that it is as large a difficulty as you have said, Congressman, though I do not doubt that you have the figures correct. I know nothing about that. I have been on the bench only three years, but I may say that I have never had any such case in my court.

Mr. Evans. I can tell you that we have got plenty in Peoria and Rock Island, Illinois.

My time is up, Mr. Chairman.

The Chairman. We will give you some more time, but right now we need to recess.

[Recess.]

The Chairman. The committee will come to order.

Lane, do you want one more minute?

Mr. Evans. Thank you, Mr. Chairman. I would like to make one short comment.

Yesterday we spent about eight hours on this committee, and we found out that the VA is essentially telling us that they do not have enough money to treat eligible veterans with hospital care, and today the judge, in talking about the case load and such things, is essentially saying that if we would give the veterans of this country the same constitutional right that all other Federal claimants have, that the courts would not have enough resources to deal with those problems. I do not think, in deference to the judge, that we should be denying the veterans of this country who fought and defended the Constitution, of the same constitutional rights that other groups of claimants have on the basis of resources and money.

I thank the Chair for yielding.

The CHAIRMAN. Thank you, Lane.

Next we will go to Claude Harris and then to Bob Stump.

Mr. HARRIS. Thank you, Mr. Chairman.

Judge Arnold, having been a judge myself for over eight years, I can appreciate your situation. We never had the luxury of being able to go before our legislature and object to anything that might put additional work on us, so you are certainly in a better position than I ever found myself in. Out of fairness, from reading, I get the impression that the biggest objection from the Judicial Conference probably would be the fact that it is going to put more work on an already overloaded court system. Is that a fair statement?

Judge ARNOLD. I think that is mainly accurate, yes. I do want to make it clear that we are not worried about having to work any harder, because in fact, we are already working as hard as we can. It is not our objection to work that brings me here, but rather our objection to the impact of additional work on the job we are already doing. I think that the quality of the job that the judiciary will do will deteriorate with increasing case loads. What we ought do be doing is contracting Federal jurisdiction rather than expanding it in order to provide a better service for the people of the United States.

Mr. HARRIS. I just noticed that in page 2, you say that the objections of the Judicial Conference are purely practical. You are certainly not taking the position that the system that we now have is working, or not working.

Judge ARNOLD. That is correct. We think that is a political question and that is up to the Congress to decide. We take no position on whether the present system is working or not. We have no expertise on that and it is not a question that is entrusted to us to decide.

Ms. MASSIE. We are also not necessarily the best place to handle such a thing. It is expensive and it takes a long time in court. All this time you are being denied benefits. It would be much quicker to go through a specialized court that could decide these matters uniformly.

Mr. HARRIS. Mr. Chairman, that is all the questions that I have.

The CHAIRMAN. Thank you.

If there is no objection from Bob Stump, I would like to call our next witness to join you, Judge Arnold. Paul Verkuil is the president of William and Mary College, and the reason I am calling him now is that he has to leave here shortly to catch a plane.

He was graduated from William and Mary College and he now serves as the college's twenty-fifth president. He is an Army veteran and graduate of the University of Virginia Law School and former professor of law at the University of North Carolina and Tulane Law School. He has worked as an expert in administrative law and government regulations and is the author of three books on this subject.

Mr. President, we would like to recognize you. If you could limit your remarks to less than five minutes, then we can get you involved in the questioning.

STATEMENT OF PAUL R. VERKUIL, PRESIDENT, COLLEGE OF WILLIAM AND MARY

Mr. **Verkuil**. Thank you, Mr. Chairman. I appreciate you accommodating me. It is a pleasure to be here.

I submitted a written statement and there is also an earlier article that has been published in the Congressional Record. I do not think that there is any need for me to repeat those things here. I would like to just mention a few things.

First of all, I am here speaking only for myself and not speaking for the American Bar Association, even though I have had involvement in various ABA committees over the years.

Certainly judicial review is a virtue in our system. The rule of law is at the heart of the Anglo-American system of government and the separation of powers. Judicial review is part of that. But this issue today, this issue of fact review of individual decisions of the Veterans' Administration, is not a constitutional issue, but rather an issue upon which this Congress may make the determination whether to extend the privilege of judicial review to those people who are currently before the Veterans' Administration. It is not a due process issue. I think that is very important to understand in the context of this situation.

So then the question becomes, for the Congress, one of deciding whether to expand judicial review. Is it a good thing? I think the answers to that will depend upon whether it will enhance the uniformity and low costs of decisionmaking, which are two of the original themes behind the Veterans' Administration decision structure. Here there are some questions that ought to be raised before you go forward.

In terms of decisions that are best suited to the courts, as Judge Arnold has testified and Judge Breyer, in effect, has testified, there are some questions. A few years ago we looked at the issue of what kinds of cases are best suited for judicial resolution, and the group called the Council on the Role of the Courts, which was formed during the Carter Administration under Attorney General Bell, of which I was privileged to be a part, concluded that if you have repetitive case loads with similar kinds of issues, that was a contraindication for judicial review. The courts can not add or improve too much on that system. The courts are better at dealing with questions such as the Federal Trade Commission might pose or the Federal Communication Commission might pose, where you have large issues, issues of policy, issues about which generalist judges have a particular perspective that is important. But when you are trying to get things consistently decided, where you want people to work within a context, where they understand the problems and where the problems have to do with medical evidence and things like that, experience is a virtue, and judicial review is not automatically to be favored. At least that was the conclusion then taken by the Council on the Role of the Courts, and I think it applies here.

In my own experience, looking at the Social Security Administration, which of course, is subject to judicial review, it is hard to discover that the courts have improved the process. Certainly they do actively monitor it and they do reverse a lot of cases. That can not be denied, but if one looks at the administrative system from the bottom up, it works pretty well as it now stands, except that you do not have enough early face-to-face decisionmaking in the Social Security Administration. You go through a State system which is more complicated by far than the Veterans' Administration and then you reach the Federal system and the administrative law judge stage.

In this context, the Veterans' Administration has a single, unified system with early face-to-face. There is a three person rating board with expertise on the questions to be faced, which reviews the file and talks to the veteran and the veterans' representatives and then makes a decision in light of those facts. It is important to remember that this is an open file situation which can be added to at any time, including on appeal to the Board of Veterans' Appeals. It is a system, in other words, where the file is constantly changing, where in effect, *res judicata* almost never applies because conditions change. A question of medical condition may change over the years, and the case can be reopened. Moreover, this present system has a bias in favor of the veterans, which means that the VA wants to aid the veterans, and I think that is a valid and deeply felt predicate of VA operations.

Finally, the rating system itself helps to decide tough cases because it, in effect, allocates percentages of recoveries based on severity of injuries and things like that. It looks into degree questions, which the Social Security Administration can not do. Until there is a good empirical study that shows a breakdown of the system and a need for judicial review, one ought to proceed cautiously.

Mr. Chairman, let me wrap up very quickly. What is happening now in these bills are some improvements that ought to be considered. Raising the fee limit is overdue and it ought to be examined. The question of review of rules is a good thing to do because the courts have a role to play in establishing law and regulations. The courts are comfortable with that role and they will help to regularize the process.

Finally, the Board of Veterans' Appeals—to make it an independent Article I Court will probably structure it in such a way that it will be more effective in improving the decision process internally. Not without costs, however, because it will involve the lawyers, it will involve a more formal system, and it will probably change to some extent the nature of the decision process.

Certainly at this stage, with those three possibilities, Congress will have gone quite a ways down the road to improving the process. To go the next step, to provide for judicial review of individual decisions is not necessary at this stage. Certainly, you would want to take a look at where these new reforms might already take the Veterans' Administration before going to that next step. Once you go down the road to judicial review, you can not turn around. Certainly in this case, given the positive aspects of the VA decision system and the overall lack of knowledge about how it works, incremental efforts, taking one step at a time in reform, are a virtue. There is no need to take these steps all at once. That concludes my remarks, sir.

[The prepared statement of Mr. Verkuil appears on p. 258.]

The CHAIRMAN. Thank you very much.

Our witnesses have been excellent this morning—right to the point.

Bob Stump?

Mr. STUMP. Thank you, Mr. Chairman. Because of the time constraints, I would just like to ask permission to submit some questions later for the record.

The CHAIRMAN. Without objection, so ordered.

Mr. Verkuil, you heard me ask Judge Arnold about the Article I Court. One of the witnesses will testify to the disadvantages. I assume from your testimony that you do not have any problem with the Article I Court, is that correct?

Mr. VERKUIL. That is correct, Mr. Chairman. I see advantages in this context because, in a way, the objections to an Article I Court, the lack of general perspective, are also the virtues of an Article I Court in this situation. I think that Judge Arnold pointed that out as well. You want expert decisionmakers who are familiar with the kinds of cases that come up precisely because these cases are repetitive. They are similar over time, and you want them decided in a uniform way. That is what an Article I Court offers in this context.

The CHAIRMAN. Are there any objections to giving Mr. Evans three minutes with the witness? He did mention his bill.

[No response.]

The CHAIRMAN. Go ahead, Lane.

Mr. EVANS. Thank you, Mr. Chairman.

The ABA supports judicial review of some kind, so the organization that you work with has, in fact, endorsed some form of judiciary review.

Mr. VERKUIL. That is correct.

Mr. EVANS. Have you had any kind of practical experience, professional experience before the VA in any kind of capacity?

Mr. VERKUIL. I have not practiced before the VA, no sir.

Mr. EVANS. You state in your testimony that there is a declared pro-claimant bias of the agency. Can you name me the numbers of cases of Agent Orange compensation for treatment that the Veteran's Administration has awarded to the veterans of this country who have claimed problems with Agent Orange?

Mr. VERKUIL. It is my understanding that they have not been awarding very many claims.

Mr. EVANS. None.

Are you aware of the numbers of veterans that were exposed to atomic radiation after World War II either in Hiroshima or Nagasaki or as veterans who were working at the nuclear test sites? How many have been awarded?

Mr. VERKUIL. Just a handful; that is my understanding.

Mr. EVANS. A handful is right. Would that alter your feeling at all in terms of the pro-claimant atmosphere for those categories of veterans at least?

Mr. VERKUIL. That is a fair question and you have to think about that in the context of what the Veterans' Administration is trying to do. They are trying to apply the law as they see it, that is to say, whether or not atomic claims and Agent Orange should be awarded. It is more of a legal question than a factual question in many respects. And frankly, if in fact you go forward with a rule-making review, a regulation review, then those kinds of questions could indeed ultimately come to the courts or otherwise be dealt with in the Congress. The answer is not to decide those kinds of questions on an individual basis.

Mr. **EVANS**. If I could pose to you the case of an Illinois veteran who was burned by napalm in Vietnam and was treated for napalm-induced burns in Vietnam, but by the last level of review, the BVA and the Veterans' Administration said that those wounds, those burns were not service connected. Wouldn't that be at least one case where the veteran ought to have the right to challenge the individual claim in his case?

Mr. **VERKUIL**. It could come up that way, but whether judicial review is the best way to decide the issue, I don't know. It would seem to me that the Agent Orange class of cases would have to be addressed on a more general basis, either Congressionally or through rules in the agency, rather than through the individual decision process.

Mr. **EVANS**. We are trying to do that and we will be talking about some legislation in this committee in the future, but we have had legislation in the past and despite having that legislation, as far as Agent Orange victims are concerned, not a single veteran of this country has ever been awarded in compensation for it.

I yield back to the Chairman.

The **CHAIRMAN**. I thank the gentleman.

Jim Jontz?

Mr. **JONTZ**. Thank you, Mr. Chairman.

Mr. Verkuil, you made some comments with regard to whether judicial review had a salutary effect on the Social Security claimants. Let me ask this: Do you agree that court review of Social Security claims has resulted in the discovery of defects in the agency's claims process?

Mr. **VERKUIL**. I am sure that it has on occasion.

Mr. **JONTZ**. And the fact that judicial review did reveal major problems by Social Security in areas like basic evaluation process, erroneous failure to consider combinations of impairments, and that sort of problem—do you understand that did occur as a result of judicial review?

Mr. **VERKUIL**. Judicial review has uncovered some things, surely.

Mr. **JONTZ**. In fact, the judicial review of the Social Security Administration did contribute to amendments passed by Congress which corrected some of the problems of the administration in 1984. Is my understanding in that regard correct?

Mr. **VERKUIL**. I am sure that the Congress was aware of the findings on judicial review.

Mr. **JONTZ**. And what was discovered as a result of judicial review was used by the Congress to correct the claims process to the benefit of the Social Security claimant. In fact, the number of Social Security cases is significantly fewer in the courts today as a result of the improvements made by Congress in the law in 1984. Is that correct, in your understanding?

Mr. **VERKUIL**. I have not looked at the number of the cases, but I will go with the flow of your questions.

Mr. **JONTZ**. I am asking for your opinion—

Mr. **VERKUIL**. In terms of the facts.

Mr. **Jontz**. Do you know the answer to the question?

Mr. **Verkuil**. I do not have the exact total of cases right now of cases before the courts in the Social Security Administration.

Ms. **Massie**. Attached to our testimony at appendix B is a listing under the twelve regional courts of appeals of the Social Security cases being filed from 1981 to 1987, which is the last year for which we have final statistics. And they have not decreased.

Mr. **Jontz**. My question is concerning the time between 1984 when Congress changed the process and 1987. Now what has happened to them?

Ms. **Massie**. As far as total cases, there are 200 less.

Mr. **Jontz**. So in fact, if one is concerned about judicial work load, it is possible that judicial review in the long run could mean improvements in the process which would mitigate what would appear to be a rather large increase in cases.

Ms. **Massie**. Some of these are just remands. They are different proceedings. There are different proceedings such as remands, dismissals, reversals and modifications. There are all different kinds of proceedings.

Mr. **Evans**. Would the gentleman yield?

Mr. **Jontz**. Happy to.

Mr. **Evans**. Did I understand you to say that you had a statistical chart of some kind.

Ms. **Massie**. Yes.

Mr. **Evans**. It's not on the copy that I received. If we could have that—

Ms. **Massie**. Certainly. I would be happy to get any statistics you need.

Mr. **Jontz**. Mr. Verkuil, if I could ask one more question. It is my understanding that the standard of review that is used in Social Security cases, the substantial evidence test, is in fact, more searching than the one contained in H.R. 639. Would that, in fact, explain why so many Social Security cases do end up in court, or at least, would that not have an impact on the standard of review? In that case would not the effect between the two be milder in terms of this legislation than what it is under Social Security?

Mr. **Verkuil**. Certainly the arbitrary and capricious test is meant to be narrower than the substantial evidence test, that is true. However, it is also true that once the courts get involved in the process, the standard of review, especially as administered by district courts who are not as familiar with it as the court of appeals are, can vary greatly. To complete the record from my point of view, certainly when you say that it is possible that the district courts or the judicial system could uncover errors in the administrative process, one can not deny that. In the Social Security situation there are examples. But the question is, at what cost to the overall system? Can the system itself, if reformed, make those changes as well and perhaps more efficiently? That is really one of the issues that is at stake here, and the system needs to be studied before you know which way to go and whether to go to the courts or not. The courts are a very costly way of making individualized changes in the system.

Mr. **Jontz**. My time has expired, Mr. Chairman, and I want to thank you for holding this hearing.

The **Chairman**. Thank you.

The Chair will go now to Bob Smith of New Hampshire.

Mr. **Smith of New Hampshire**. Thank you, Mr. Chairman.

I have just one question. I know you have to leave. It doesn't have to be directed to you.

In looking at the issue of judicial review, I agree with your conclusion that placing all of these cases, whether they be Agent Orange, atomic exposure, or whatever it is, within the parameters of the legal system and bringing a case-by-case basis—I think the lawyers would do well. I am not sure the veterans would do all that well. I agree with your conclusion on that.

But I don't agree with the way you reached it. All of you in your testimony have said that—basically the main thrust of your testimony is that we can't do this because it will increase your caseload.

As members of the Veterans' Affairs Committee, if that's the problem, then maybe we ought to have more judges. I think to deny the veteran the opportunity for an appeal because the caseload is too high—surely we can come up with a better reason than that. I'd like to hear one or two.

Mr. **Verkuil**. Well, certainly, I don't mention that as a primary argument. I appreciate the view of the judicial branch as well.

I think that the real reason is: Can we do a better job correcting any errors within the system short of judicial review, and thereby not create an additional burden on the system. If you can, then it's better to do it internally.

An internal system has got to do better than one externally reviewed by the courts. It has to work from the bottom up. Until it is shown that that can't be improved, it seems to me that the courts are not the way to go.

I'll agree with you, if it comes down to that. If you have a recalcitrant bureaucracy, and if you feel that injustice is being done that cannot be corrected short of that, then that is an option the Congress should consider.

Ms. **Massie**. Congressman, I think if you look to the experience of labor and management, they found that the courts were not the best place to deal with their particular problems. They have gone to a different system.

We're not suggesting that the courts could not do the job. We are suggesting that they are probably not the best place to provide the kind of justice and the kind of expertise and the kind of uniformity.

One problem we do have with Social Security is that you have a Social Security recipient who is treated different in California than he is, for example, in Virginia, Minnesota, or New Hampshire. This would certainly not seem fair when they are supposed to be receiving benefits under the same system.

We just don't believe that the courts are necessarily the best place. We will always hear appeals on these issues on interpretation and rules. We have no objection to that. That is fine. We would love to do that for you.

Mr. **Smith of New Hampshire**. I have one final point, Mr. Chairman.

I just want to repeat that I agree with that. I don't support judicial review for that reason. I think it is a mistake. I think we are going to complicate matters and go on a case-by-case basis here, as you have said, Mr. Chairman, and which I agree with you.

I guess what I am getting at—and maybe it is out of your parameter. Maybe it should be for the next group of witnesses. But that is small consolation to a veteran who was—in the case of Mr. Evan's example—naponed in Vietnam and is denied any help. To say that the court caseload is too heavy in the courts and we can't handle you, and the VA isn't going to give you anything for whatever reason through their appeals process—the point is we are skirting around the issue here.

I think this committee really needs to deal with it, whether perhaps it is a decision to say that if you were naponed in Vietnam then you deserve benefits somehow without going through a lot of rigmarole, or something along those lines.

I realize as judges and as legal people you have to testify to your own areas. I just wanted to make the point that I don't think saying that the judicial caseload is too heavy is reason enough to deny veterans what they deserve. I just wanted to make that point.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Bob.

The Chair recognizes Doug Applegate.

Mr. APPLEGATE. Thank you very much, Mr. Chairman

I, of course, take the opposite view of my good friend and colleague, Bob Smith. I do support judicial review. As a matter of fact, I am a cosponsor of H.R. 639.

I suppose in the years that my good friend, Sonny Montgomery, has been chairman of the committee, this may well be the first time that he and I have disagreed on any particular issue. As a matter of the fact, most of the committee generally works pretty much together. This is probably the one issue that has divided this committee more than any other issue since I've been on it in my 12 years.

I happen to think it's a very important thing, perhaps as much a matter of principal as anything else.

Listening to Judge Arnold, who is head of the Judicial Conference, you state—and I will just ask this sort of a three-part question, Judge Arnold—that the Judicial Conference, and you personally, I assume, oppose judicial review. Some of these questions may already have been answered. I am sure that they have, but I think sometimes they should be answered again and again and again. But let me ask you these three.

Do you oppose judicial review for social security, black lung, worker's compensation, and others of the benefit programs?

You had mentioned that your opposition is based on practical or logistical grounds, primarily referring to the workload, costs, attorney fees, and things of that nature. My question on that is: What about the principle? There certainly must be some way to circumvent any kind of a logistical problem. I think the principle must be involved.

Then, of course, you mentioned the deterioration of the courts. I ask you this: What about the deterioration of the veterans' rights? those who fought and died to defend the right to his or her day in court? That is more or less a rhetorical question. But it is one, I think, that needs to be answered if we are going to try to reach conclusions to this question.

Then I should ask—in talking about the courts—do or would you support a special court? Would it be necessary to set up a special court in order to implement judicial review on the basis of H.R. 639?

Mr. ARNOLD. Congressman, the Judicial Conference of the United States is second to no one in its regard for veterans. The benefits which Congress has decided ought to be received by veterans ought to be jealously guarded by Congress by any means that it thinks is necessary to do that.

I am asking you simply to do this, sir. If you want us to do that, give us the resources to do it, and do it properly, that's all, so that other litigants don't suffer as a result of an increase in Federal jurisdiction.

Mr. APPLEGATE. So you would support it if you were given the tools.

Mr. ARNOLD. I have, however, already expressed a second reservation, as President Roy Kyle has. That has to do with whether fact-finding by the judiciary is—in this area at least—the best way to proceed.

We think that the case-by-case adjudication of individual rights is the normal and proper stuff for the Judiciary. The repetitious adjudication of routine claims are the kind of things which are equally important but probably more properly entrusted to an Article I tribunal of a special character.

So the answer to your question with respect to the special court is: Yes, we would support the creation of an Article I Court if Congress makes the political decision that the job presently being done is an inadequate job. On that point, of course, we express no opinion because we don't think it would be proper for us to do so. It is something for you all to decide in the exercise of your own expertise.

Mr. APPLEGATE. How about the answers to the other questions?

Mr. ARNOLD. I believe that I answered them all. If I didn't, I am sorry. I wrote them down.

Oh, I am sorry, you asked me: Do we oppose judicial review of social security, black lung, and so forth? We do not.

We do wish, however, that Congress would develop a uniform approach to these matters. At the moment, the scope of review, for instance, with respect to these different kinds of benefits is different. We would think that—as we have indicated before in our testimony—it would perhaps be a benefit to the public if the Congress of the United States would consider developing a uniform standard and uniform approach to these matters.

In some agencies, as you know, some benefits are not judicially reviewable at all. With respect to Social Security, there is something like seven levels of appeal.

Mr. VERKUIL. May I add just a thought to that, Mr. Applegate?

The idea of this Congress having an opportunity to create a decisionmaking laboratory is very appealing. To make incremental decisions on the administrative process gives you a range of choice. Create, for example, an independent or Article I BVA and see how that operates on the internal decision system. It might reveal meaningful results which can tell you more about the disability process generally.

It is an enormously difficult decision process. There are millions of cases overall in the country. This is an opportunity to look at it from a different perspective, it seems to me.

Mr. EVANS. Will the gentleman yield?

You are suggesting we should create a whole new bureaucracy as an experiment?

Mr. VERKUIL. Well, it is, in fact, different. The VA has an opportunity to look at decisionmaking here—especially in light of some of the changes already suggested in these bills—in a different way than it would be at the SSA or in other forms of benefits that have been mentioned, the black lung, and so forth.

You don't have to make a decision right now as to how all disability cases should be decided. It is a chance to look at a variety of options. I think this ought to be one because it does have a promise.

The CHAIRMAN. The time of the gentleman has expired.

The Chair would like to recognize Mr. Solomon for a brief statement.

The Chair would also recognize Don Edwards, the ranking majority member, if he would like to make any comments after Mr. Solomon.

Mr. SOLOMON. Thank you, Mr. Chairman.

I just wanted to thank Mr. Verkuil before he leaves for his really excellent testimony. I am not a lawyer myself. I have never heard testimony like yours in laymen's language that everybody can understand. It really was right on the ball.

I also would like to take a little bit of exception with my good friend, Lane Evans, when he was sort of badgering you, I think, on the Agent Orange issue and whether you knew of any situations for any veterans.

I think we ought to point out for the record that the scientific community, the Center for Disease Control, the Congress' own Technology Assessment Board, no one, and even the Congress of the United States, has even dealt with presumption as far as Agent Orange is concerned. That is really an unfair question, I think, to ask, with all due respect to the gentleman.

Mr. EVANS. Will the gentleman yield?

Mr. SOLOMON. I'd be more than glad to yield.

Mr. EVANS. You know there is legislation on the books that does create some categories that have never been used by the VA, just to set the record straight.

Mr. SOLOMON. I understand.

Mr. EVANS. We have dealt with this issue. Then Congressman Tom Daschle will successfully pass it.

Do you think, however, there is a need for further legislation?

Mr. SOLOMON. I think the debate ought to be between you and me and the Members of the Congress on dealing with the issue.

Mr. EVANS. I am just asking the gentleman testifying if he is aware of anybody that has received compensation treatment under the legislation we have already previously passed.

Mr. SOLOMON. Again, I thank the gentleman for his testimony. It was really excellent.

The CHAIRMAN. Don Edwards?

Mr. EDWARDS. Thank you, Mr. Chairman.

We certainly have come a long way since the hearings on judicial review two years ago. I am delighted that the various major veterans organizations are now on record in favor of judicial review.

Judge Arnold, I always respect the views of the Conference, of course. I am reminded, however, that the Federal judicial system is the reservoir and the bulwark of our freedoms and liberties in this country.

Personally, I am bothered that other litigants can be served in the Federal courts, as they should be, and yet, somehow or another, we are not going to allow the veterans these same rights. This puts the veterans into a second-class status, and it disturbs me.

You, above all, know the problems that specialized courts have. Every once in a while, if we don't watch them very carefully, they become sweetheart courts compared to the great Federal system of Federal district judges and so forth. I only make the observation that apparently judicial review has now come of age.

I appreciate the Chairman very much having these hearings. I really congratulate the gentleman from Illinois, Mr. Evans, who has been so faithful to this issue and who is the author of H.R. 639, which I support.

Thank you, Mr. Chairman.

Mr. ARNOLD. May I say, Mr. Chairman, that the Judicial Conference of the United States greatly appreciates the confidence that the Congressman has in us.

Mr. EDWARDS. Well, since you said that, Judge, is it really your testimony that if you got the resources you could handle the job better than anybody else? Don't you really think so?

Mr. ARNOLD. No, sir. I don't think we could. But nevertheless, if we get the resources, we will gladly shoulder the burden. We do appreciate the confidence that that would demonstrate that the Congress had in us. But I don't think that it is the proper place for the determination of these kinds of issues. But I know that reasonable persons can disagree on that issue, and have.

Mr. EDWARDS. Even unreasonable persons.

[Laughter.]

Mr. ARNOLD. And do.

Mr. EDWARDS. Thank you.

The CHAIRMAN. Thank you, Don.

General, we all appreciate you staying around. I am glad you don't have to catch a plane. We are not through with you yet.

The Chair would recognize Mr. Staggers. If you have to leave, Mr. President, you can just ease off.

Mr. VERKUIL. Thank you, Mr. Chairman. I appreciate this. It is a pleasure to be with you.

The CHAIRMAN. Thank you, sir. You are very helpful.

Harley?

Mr. STAGGERS. Thank you, Mr. Chairman.

I would like to make the comment that everybody has agreed on: the VA does a pretty good job. I think all of us have had success with the VA system.

As Lane Evans and other people have mentioned, it is those individual cases we are concerned about. Whether it is delayed stress or some other problem, I have a veteran right now that has been denied. He has independent medical evidence. He can't get his appeal processed, so he can't get the finding.

I guess that Mr. Smith really summed up my argument also. It is a very weak argument to say that it would be a burden on the court. If we are going to make a determination, it should be for something else. We are the Veterans' Affairs Committee.

If I could sum up, basically, what I think you've told us is that there is cost, it is too great, and fact-finding is better done some place else. You don't trust attorneys, and there is a better way to do it.

I think that, as Mr. Smith has pointed out, cost shouldn't be a factor. Mr. Evans has also pointed out that, if we are going to create another bureaucracy there is going to be a cost. The money comes from the same place one way or the other. It is either going to be in an Article III, or it is going to be in an Article I.

I think that Mr. Johns points out that when we have enacted and put additional burdens, it has bettered the system.

The thing that bothers me is that in West Virginia if you are an immigrant worker—not here as a citizen, but to pick apples—you have a right to an attorney, you have a right to appeal, you have a right to go to the Federal court. But we are telling our veterans that they don't have those rights. I think there is something wrong with that concept when we continue to do that.

Judge, you mention that this language would create confusion. I guess I would argue with you that if we would not take this legislation, then we would never legislate if it was going to create confusion in the courts. That is an observation that I don't think is a very good argument against this piece of legislation.

You also used Social Security as an example. Judge, you mentioned that you are not in favor of taking Social Security and putting it into an Article I, or black lung, or worker's compensation.

Mr. ARNOLD. I didn't say that, Congressman.

Mr. STAGGERS. I thought that in answer to Mr. Applegate's question, you are not in favor of putting those into an Article I.

Mr. ARNOLD. No, sir. I don't believe that was the question that he asked. In any event, it was not the question that I answered.

I said that I was not here today to testify that we are opposed to the present system.

I think it might be an interesting and probably valuable experiment to devise an Article I Court that would, in fact, handle three or four different kinds of governmental benefit appeals, including Social Security. That might produce the tunnel vision effect that some people see as a difficultly with Article I Courts. It also would keep them from being captured by certain groups. There has been some concern expressed here today that that might happen with respect to an Article I Court.

Mr. STAGGERS. So you are saying, create an Article I Court for all of these?

Mr. ARNOLD. I am just saying that that would be an experiment that you might want to try as a possible alternative. It is not a main thrust of my testimony.

Ms. MASSIE. The Judicial Conference has been—since we have studied these issues, including Social Security—on record as being opposed to full judicial review of Social Security. We favor the same type of Executive Branch, independent Article I type court for all types of benefits.

As I stated earlier, the childhood vaccine compensations are now in an Article I claims court with appeals into the Court of Appeals for the Federal Circuit.

We will always take any benefit from the Article I Court on appeal into either the Regional Court of Appeals or the Court of Appeals for the Federal Circuit or the District of Columbia. We will always do that regardless of the burden.

Mr. STAGGERS. What would be your response to Mr. Edwards' observation of abuse, a sweetheart type of arrangement? I think that it logically follows that an Article I Court would allow for some specialty. But doesn't it also allow for at least the appearance of a lack of independence that an Article III court would?

Mr. ARNOLD. Certainly there aren't as many indicia of independence in the Article I Courts as there are in the Article III courts for the obvious reason, among others, that Article III judges are appointed for life. Therefore, presumably at least, they are not likely to be subject to the same kinds of pressures as other kinds of judges. That is certainly correct. That is one of the great safeguards of the separation of power.

But the experience of many Article I Courts has been to the effect that a great deal of independence has been achieved. Indeed, as much independence in most instances, or at least in many, as by Article III judges.

Mr. STAGGERS. One further question, if I may.

Judge, you have mentioned that you would need 11 or 12 new judges?

Mr. ARNOLD. That is our estimate, yes, sir.

Mr. STAGGERS. What is the estimate of cases that you base that on? How many new cases would you envision?

Mr. ARNOLD. Ms. Massie has those figures more or less at her fingertips. I believe it is in the testimony, Congressman.

Mr. STAGGERS. Do you recall where those figures came from?

Mr. ARNOLD. They came from a study by the Judicial Conference. I am told that it was based on a reasonably conservative estimate of the number of cases that were like to be loosed on the courts in the event that one or more of these bills were passed. I was not in on the study, so I can only testify as to what the staff has provided.

Ms. MASSIE. We received figures from the Veterans' Administration estimating the number of cases that they deny. We took the Social Security experience and used the same percentages that we see existent in those cases. We applied the same assumptions to VA cases.

Mr. ARNOLD. By the way, Congressman, I might say that there is some reason to believe that veterans might pursue their claims somewhat more aggressively than some Social Security claimants have. In which case, the caseload would be even greater than has been the experience under Social Security. So we think this is a fairly conservative estimate. But it is only an estimate.

Mr. STAGGERS. But it is the same percentage as Social Security. You would agree that probably the VA does a better job than Social Security does?

Mr. ARNOLD. We don't take a position on that, Congressman. We don't have any way of knowing. If we did, I don't think we would take a position on it. We don't think that's our job.

The CHAIRMAN. Thank you very much.

Mr. Bilirakis?

Mr. BILIRAKIS. Thank you, Mr. Chairman.

Mr. Chairman, I have been asked what my position might be on this legislation. I have said that I am open-minded. I just want to listen to the testimony. After all, that is what this is all about.

I am concerned that the Congress—certainly in the time that I have been up here, and God knows before that, and long after I am here—is famous for cities in ivory tower, creating legislation, and telling the people what is good for them, rather than listening to the people and having the people tell us what is good for them. This is, of course, what the founders intended. You get opposite the view that the people should be telling us rather than the other way around.

If we are going to come up with legislation here which is going to shove something down the throats of the veterans, we want to make sure that it is good for the veterans rather than our telling them that "this is good for you, believe me, this is good for you." So I am concerned about that.

Judge, are you familiar enough with President Verkuil to know whether he, in his capacities as former Chairman of the Administrative Law section of the Association of American Law Schools and in his current capacity as Chair Elect of the section on Administrative Law, has had personal experience in making similar determinations regarding other areas of administrative law?

Mr. ARNOLD. Congressman, I am sorry, I can't answer that question.

Mr. BILIRAKIS. Okay.

That is a question I would have wanted to ask him, but time, of course, did not afford it.

Mr. ARNOLD. Yes, sir.

I am sorry. I think it would be wrong of me to answer it. I am not sure that I know the answer.

Mr. BILIRAKIS. I don't know whether it would be proper, Mr. Chairman, if we might pose this question to the president and have him respond. I would like to know what kind of experience he has had in making similar determinations.

The CHAIRMAN. It's no problem to do that. Without objection, your question will be submitted to the last witness.

Mr. BILIRAKIS. Okay. Now Judge, I would then have maybe one question to ask of you.

You are certainly familiar, are you not, with an average cost of appeal for any type of a case to the Federal Court of Appeals. How would you respond to that? Basically, I would like to know what that cost would be. It would be a cost to the veteran, would it not? What cost would that be versus maybe the cost to an Article I Court.

Mr. **Arnold**. I'm sorry, I'm not clear what the question is. The cost of an appeal to the Court of Appeals?

Mr. **Bilirakis**. Yes.

Mr. **Arnold**. Of a litigant from a district court?

Mr. **Bilirakis**. Well, yes.

Mr. **Arnold**. Are you thinking of the court?

Mr. **Bilirakis**. If this legislation passes, or some pieces of legislation pass, we are talking about from the BVA to the Court of Appeals.

Mr. **Arnold**. Yes.

Mr. **Bilirakis**. So we are basically talking the same thing.

Mr. **Arnold**. Well, there would be a filing fee of $120.

Mr. **Bilirakis**. Yes.

Mr. **Arnold**. The court costs are likely to be insubstantial compared to anything that might be, in most cases, expended because of lawyers. So the lawyer's fees would be the main cost.

Mr. **Bilirakis**. The main cost would be the lawyers.

Mr. **Arnold**. Yes, sir, it would be.

Mr. **Bilirakis**. What is a rough estimate on lawyers fees?

Mr. **Arnold**. Assuming that there was no cap put by the legislation on lawyers fees—as there might very well be—lawyers work for varying rates around the country. They might vary considerably, of course, depending on the experience and the expertise of the lawyer. But they could range in sort of a reasonable range even from $75 to $150 an hour. Of course, in big cities like Washington, they could cost even more than that. But good, competent representation in a court generally costs in the range that I have just identified.

Mr. **Bilirakis**. I would tell you in a small community like Tarpon Springs, Florida, it starts at about $150 an hour.

Mr. **Arnold**. Yes. I am not surprised.

Mr. **Bilirakis**. It is a small area.

But you can't extrapolate that into maybe a rough figure based on approximate number of hours?

Mr. **Arnold**. I would be afraid to. But assuming, again, that there is no cap put on by the legislation, it would be in the thousands of dollars.

Mr. **Bilirakis**. Thousands of dollars.

Mr. **Arnold**. That would be my guess.

Mr. **Bilirakis**. Well, if there is a cap, and apparently the caps that we are talking about here are in the hundreds category, do you anticipate that there would be many lawyers out there who would be willing to take a case to court?

Mr. **Arnold**. It would depend obviously, of course, on the complexity of the case. What would happen is that you wouldn't get the same effectiveness of representation as you would get if you were paying the market price. That is one effect of price controls, as you know.

Mr. **Bilirakis**. All right.

I see my time is up. Thank you, Mr. Chairman. Thank you, Judge.

The **Chairman**. Thank you. The time of the gentleman has passed.

Liz Patterson, South Carolina.

Mrs. **Patterson**. Mr. Chairman, I regret that I have been coming and going. I am extremely interested in this.

As a person who represents a district where one out of nine are veterans, I have gotten a lot of calls on this particular issue.

Mr. **Arnold**. Yes, ma'am.

Mrs. **Patterson**. Of the constituent services that we render in our office, over 60 percent are on veterans benefits. So I am extremely interested in judicial review and how we proceed. I hope you do not mistake my interest in this as I come and go.

Mr. **Arnold**. Not at all.

Mrs. **Patterson**. I appreciate your statements and your being with us. I will, as I have heard others say, be here with an open mind as we deal with this issue.

Thank you, Mr. Chairman.

Mr. **Arnold**. Thank you, ma'am.

The **Chairman**. Thank you very much.

John Bryant of Texas?

Mr. **Bryant**. Thank you, Mr. Chairman.

If there is not an objection, I have a statement that I would like to enter in the record, and especially emphasize my support for H.R. 639, as other members have.

The **Chairman**. Without objection.

[The information appears on p. 187.]

Mr. **Bryant**. I am concerned about the fact that we are in this hearing and taking up the question of process first. That may be because schedules of the witnesses required it, I don't know. But I don't think we ought to lose sight of the fact that apparently you all have no opinion here—or are expressing no opinion—about whether or not the veterans out there are being denied benefits unjustly. Is that correct?

Mr. **Arnold**. That's correct, yes, sir.

Mr. **Bryant**. Are you just here to talk to us about the process for adjudicating those controversies?

Mr. **Arnold**. Yes, sir. That's correct.

Mr. **Bryant**. Okay. I think it is important to emphasize that.

I also think that it is of some interest, since we are talking about process, to point out that we are talking about benefits that for most of the veterans involved are critical to whether or not they are going to be able to live and function in a normal fashion.

It is interesting how those of us who make a good salary—as everybody in this room does, including you all and the President of William and Mary—can get to talking about whether or not we ought to bother the Federal courts with the factual determinations about whether or not an individual veteran receives, say, $500 a month, when that is going to be absolutely determinative of whether or not he lives in dignity or not.

Our Federal courts in Dallas right now are embroiled in a big law suit between H.L. Hunt's sons and the banks about who is going to get hold of millions of dollars. When those law suits are over, it isn't going to change anybody's life style. I think we ought to make that point here.

I think the Judicial Conference would do well—in addition to developing their opinion that they are over burdened with cases—to take a look at whether or not individual veterans may not be getting the kind of benefits that they are entitled to because of some kind of injustice or inefficiency at the VA. In fact, there is a study out that was done by the Governmental Affairs Committee which concluded exactly that. I'll spare the committee and the witnesses from a reading of all the conclusions.

It does bother me somewhat when the president of a great university comes to talk about the process, and we have a Federal judge of three years experience here before us speaking on behalf of the Judicial Conference, but there seems to be nobody taking a look at whether or not the individual veteran is really getting justice under the current system or not.

I think you could probably defend yourself by saying nobody asked you to, but it occurs to me there are some responsibilities we ought to just undertake on our own.

Mr. **ARNOLD**. Well, may I respond, Congressman?

Mr. **BRYANT**. Sure.

Mr. **ARNOLD**. Let us assume that veterans are not getting proper service at the moment. Let's just make that assumption. The question then becomes: What is the best way to make sure that that happens?

That was the basis of my testimony. I certainly said nothing, sir, to indicate that the Judicial Conference thinks that these matters are too trivial. That was not even suggested by my testimony whatsoever. I take exception to any suggestion, sir, that that was part of what I was saying.

Mr. **BRYANT**. I understand that. I didn't wish to characterize your statement as calling these matters trivial. But I think by implication that is kind of what it involves.

Mr. **ARNOLD**. If there is any such implication, I certainly want to do everything I can to withdraw it from your mind, sir. That is not it at all.

Mr. **BRYANT**. I think there is an implication that this is not something that you are going to consciously agree to. But I am just arguing that is basically what it boils down to. If we have the time to adjudicate whether or not H.L. Hunt's sons get the money or the bank gets the money, it occurs to me we have the time to adjudicate whether or not a veteran who may be living in a trailer house gets $500 a month or not.

Mr. **ARNOLD**. If the Congress decides that it is a political matter, that is something that ought to be done.

All we are asking is that you make that decision and then give us the resources to have that decision done—if you have that decision made in our courts—if you believe that the courts, as we do not, are the proper place for that decision to be made. That's all.

As I have said before, we are second to none in our regard for veterans. We have no position one way or the other on whether the veterans are being properly served at the moment. We think that is a political question and not for a non-political branch of the Government.

Mr. **BRYANT**. If one decides that we have a system that is not dispensing justice to veterans, then we have an obligation, this Veterans' Committee, to find a solution to that injustice.

Mr. **ARNOLD**. We couldn't agree more.

Mr. **BRYANT**. I am glad to hear you underline that.

Mr. **Arnold**. By all means. I am glad to have the opportunity to emphasize that.

Ms. **Massie**. Congressman, if I might add something to this.

Our indications of being overburdened are also to illustrate exactly how long it would take a veteran who has been denied those benefits to get them. We estimate that it is anywhere from three to five years. If he is in critical need of it, then he needs some sort of way that he can go about this that is less expensive, less fraught with delay, and less emotionally traumatic than going through the Federal court system.

Mr. **Bryant**. But you see, what we are still debating here is whether or not he is going to get a chance to get at them at all. Under the present system, he doesn't get a chance to get at them at all. That is the point I am making.

The **Chairman**. Thank you very much, John.

We have one more individual to talk to you, Judge Arnold. The point I am trying to make here is that we have four other panels after this. The Chair will certainly not cut off Joe Kennedy. I appreciate him being here all morning. The Chair recognizes the gentleman from Massachusetts. He has been here all morning.

Mr. **Kennedy**. Mr. Chairman, if you believe that then I am going to roll right with it.

[Laughter.]

Mr. **Kennedy**. Judge Arnold, thank you for coming before the committee this morning. I appreciate the concerns that you have raised with regard to how judicial review might impact our judicial system in general.

Obviously, you know, we are working on the drug bill over on the House floor. I would assume that that bill with all the provisions that are put in it is also going to be a further burden on the judicial system.

It just seems to me that in that regard we wouldn't be hearing judges come before the committee of jurisdiction and saying that we ought not to be passing the laws because it is going to be a further burden on the judicial system. I am not suggesting that you wouldn't find that there would be burdens, but I am suggesting that you wouldn't find judges claiming that we shouldn't be changing the laws in order to deal with that.

Mr. **Arnold**. May I make two comments on that?

Mr. **Kennedy**. Sure.

Mr. **Arnold**. I think, in fact, you might have such testimony from judges, Congressman, with respect. I think that, in fact, with respect to some substantive matters the judges are likely to be concerned in the future, at least, with the increased burden.

The second is that it is not a different kind of business. That is, we have always dealt with drug matters. When a different kind of business is brought into the court, then we think it is an opportunity for us to make our point with respect to what we think are inadequate resources. But you are right, it has the same kind of impact.

Mr. **Kennedy**. I think you put your finger on it with regard to the whole notion of inadequate resources. But because of inadequate resources does not mean that there isn't a moral obligation to take on the case of injustice wherever it exits.

Mr. **Arnold**. Absolutely. We have no quarrel with that proposition whatsoever.

Mr. **Kennedy**. Then it comes down to what extent are we really overburdening the court system?

Mr. **Arnold**. Yes, sir.

Mr. **Kennedy**. We have used this figure of 4,500 additional cases that is the guesstimate as a result based on the Social Security system. I would just like to read you a little explanation that I was given with regard to how the 4,500 number was arrived at.

The 4,500 number estimate was obtained by using the current appeals rate in the Social Security system.

Mr. **Arnold**. Right.

Mr. **Kennedy**. This system does not resolve cases in favor of the claimant if reasonable doubt exists. The VA currently does. So there should be lower numbers when the VA system would be put in place.

Mr. **Arnold**. It might be, except—

Mr. **Kennedy**. Currently, 2.5 percent of the regional office cases are appealed to the BVA, which could potentially result in about 800 cases a year going to court rather than the 4,500.

In other words, if you just used the same ratio that exists today that comes out of the regional offices and gets banged up to the BVA, you are going to find that that is not the 4,500, but is rather 800.

The CBO estimated that the cost would be about $4 million and that there would be no need for expansion of the court system. So this is in conflict with some of the other numbers that we heard today. I thought you might want to comment on that.

Mr. **Arnold**. Yes, sir.

Let me say, as I have said twice before already, that what we have come up with is an estimate which is our sincerest best guess as to what is likely to happen. We think it is conservative, as I said before.

I think there is some chance that veterans' appeals might be pursued more aggressively by veterans than Social Security claims are simply because many people who are entitled to Social Security claims may not know of their rights. They may not be as aware of their rights. Their consciousness might not have been as raised as other kinds of groups of people. We don't know. It is a matter for study. We have done the best we can to come up with a reasonable figure.

Mr. **Kennedy**. Do you agree that if the reasonable doubt criterion is used for Social Security that that does place a different burden on the Social Security than if that reasonable doubt is used in favor of the claimant on the VA system?

Mr. **Arnold**. I think that's an excellent point.

Mr. **Kennedy**. So we can lower the numbers to 800?

[Laughter.]

Mr. **Arnold**. Except that I think that it ought to be raised back up to 4,500 because of the likelihood of a higher rate of appeal, that's all.

Mr. **Kennedy**. In any event, I can understand your concern. I think it is appropriate for you to bring it before the committee in terms of the taxing of the judicial system.

Mr. **Arnold**. Yes, sir.

Mr. **Kennedy**. On the other hand—knowing your record and Judge Breyer personally—I can't believe that you are both not concerned about whether or not justice is being served. That ought to be the priority of the country. If we have to increase and help out our legal system in order to make certain that justice is served, then that is a separate issue. But denying people access to that—

Mr. **Arnold**. Absolutely. We couldn't be more in agreement with what you say.

Mr. **Kennedy**. We will try to get you guys some more money as well.

Mr. **Arnold**. It is music to my ears, Congressman. Thank you so much.

Mr. **Kennedy**. Thank you. Thank you, Mr. Chairman.

Mr. **Evans** [Assuming Chair]. Judge, I want to thank you, Ms. Massie, and the president of William and Mary for being with us, badgering and all, for two and half hours or so. We do appreciate your time and your testimony before the committee today.

Mr. **Arnold**. I am absolutely delighted to have been here, Congressman, and to have this chance. When I was over on the Senate side, they gave me two and a half minutes.

[Laughter.]

Mr. **Arnold**. So you can see that I think maybe that between the two Houses, we probably averaged out about right, don't you think?

[Laughter.]

Mr. **Evans**. I think so, Judge.

Thank you very much.

Mr. **Arnold**. Thank you all very much indeed. We are very grateful to you.

Ms. **Massie**. Thank you.

Mr. **Evans**. Next we would like to call a panel consisting of Rick Heilman and Joe Zengerle of the Disabled American Veterans; Sam Walsh and John Sommer of the American Legion; and Jim Magill of the VFW. Again, as always, we will include your complete testimony in the record. If you would like to summarize, we would appreciate it.

We can proceed whenever you are ready.

STATEMENT OF JOHN F. HEILMAN, NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS; ACCOMPANIED BY JOSEPH C. ZENGERLE, DAV COUNSEL

Mr. **Heilman**. Thank you, Mr. Chairman, and members of the committee.

With me today, Mr. Chairman, is Mr. Joseph Zengerle. He is a West Point graduate, a Vietnam veteran, an attorney, and DAV Counsel.

I will summarize my statement, Mr. Chairman. Then Mr. Zengerle and I would be pleased to respond to any questions you may have.

We do appreciate the opportunity to join in today's discussion on this most important issue. It has been noted by several members of the committee, including Chairman Montgomery, that there is a degree of optimism surrounding this hearing as opposed to the one two years ago because we are not talking about whether there should or should not be judicial review. In terms of the pending bills and the views of the proponents of the bills, we're talking about what is the extent of the modification that should be made in S. 211-A. What is the extent of judicial redress that should be extended to veterans and brought into the system for the benefit of everyone involved?

Notwithstanding this bright note, there is a fundamental impasse surrounding the issue and the four bills. It has certainly been talked about by the previous witnesses. This impasse is the question of fact review.

Should S. 211-A be modified so that we have judicial review in the Federal Court system, Article III courts, of individual benefit determinations, questions of fact, and also questions of mixed law and fact, with the accompanying invitation through the removal of fee limitation for private attorneys to involve themselves in these issues?

On the other side of the coin is the proposal that a greater degree of independence should be given to the Board of Veterans' Appeals. In terms of the two approaches by S. 2292 and H.R. 5039, you could say there's a little rheostat involved here in terms of the independence that is given and the movement of this new independent tribunal towards an Article I Court or the functional equivalent of an Article I Court. That's one aspect of the other side of the coin.

Also involved is allowing this new independent tribunal to review rules and regulations, to not be bound by VA precedent, and to invite private attorney involvement in the proceedings with respect to these issues.

In examining these two alternatives, we would suggest to the committee that you do so in terms of two points. Number one: What are the benefits that will accrue or that will be given to veterans and to the system? On the other side of the coin, what are the costs that are involved?

Before I get into the costs involved, let me just underscore that by costs, certainly we in the DAV are not talking about costs added to the Federal Judiciary if we're talking about fact review. What is it going to cost the taxpayer or the Congress to appropriate additional resources for Federal judges, support staff, and that type of thing.

We're not talking about the same type of monetary costs that will be imposed on the VA where they would have to hire more adjudicators or more claims personnel, although that should be a factor in deciding whether or not we give judicial review or a certain amount of judicial review or not. Those are not the costs we're talking about.

We're talking about the costs to the system, the costs to the veterans themselves in terms of the way the system presently handles their claims.

One of the witnesses that will come before you this morning has described the VA as so fundamentally flawed and institutionally corrupt that the only recourse is to allow fact determinations in the Federal Court system.

We certainly don't agree with that characterization. We don't believe that that should be the basis of the subcommittee's consideration and deliberation of the issue. Exaggerated, incorrect statements of that sort certainly do not lend themselves to a consensus that's in the best interest of veterans and their system. There are problems inherent to the VA . . .

I just got off the ground and I see my red light is on.

Mr. EVANS. If you can complete in a few minutes, we've given that to everybody else.

Mr. HEILMAN. Thank you, Mr. Chairman.

There are problems inherent to the process right now. They are related to lack of funding, staff, training, managerial problems, dwelling on end products, quality control, and measurement of productivity. All these things can impact on the way benefits are handled and adversely impact on the entitlements that are given to veterans.

But it's a quantum leap to say that these types of problems can only be resolved by throwing the VA—this mass adjudicative Agency—into the Federal courts and inviting full court involvement and attorney involvement in this system. That's not the answer. That has been indicated by the previous witnesses.

When you look at the standards for review proposed by S. 11 and H.R. 639, you see on the one hand that it can be very, very narrow so that practically no one can qualify under the standard. In fact, the Senate recognized that during their debate because they started to erode the standard a little bit and said, well, what we're really talking about here is serious injustice.

On the other hand, H.R. 639—and insofar as mixed questions of law and fact are concerned, S. 11 would allow the arbitrary and capricious standard for those types of issues. Don't be disillusioned that these bills are not opening up all individual benefit determinations to fact review in the courts, because they are. They are also going to invite attorneys into the system.

When attorneys practice their adversarial trade, their craft, that's the impact we're worried about in the VA. Record building, issuing subpoenas requiring depositions of reluctant witnesses, creating confusion wherever possible.

An attorney is going to zealously pursue for his claimant. That is his duty and obligation. The attorney doesn't care what the impact is on the system. That's part of the problem we have in terms of the litigation explosion in the country with medical malpractice, product liability, whatever. The zealous pursuit to do all that you can to win for your claimant—as an attorney should do—has tremendous costs that the rest of society, the rest of the consumers, have to pay. That's what we're concerned about seeing in the VA system.

That's why we support S. 2292 which has, we believe, a balanced approach of review of rules and regulations, those broad types of issues, and attorney involvement there, and the creation of an independent Board of Veterans' Appeals. We think that this approach provides necessary judicial review and, at the same time, preserves the unique and valuable aspects of the VA system, which truly is in the vanguard when you talk about ADR—Alternate Dispute Resolution mechanisms. It's informal and it's efficient. It has a pro-claimant bias. That should be preserved at all costs. We believe S. 2292 does that.

Thank you for the extra time, Mr. Chairman.

[The prepared statement of Mr. Heilman appears on p. 266.]

Mr. EVANS. Thank you.

Mr. Walsh?

Mr. WALSH. Thank you, Mr. Chairman.

First off, I would like to express the American Legion's appreciation for Congressman Montgomery and Congressman Solomon for introducing H.R. 5039 in our behalf.

With me this morning here is Eric Hirschhorn, our counsel, and John Sommer from VA in our division. John Sommer will present our testimony.

STATEMENT OF JOHN F. SOMMER, JR., DIRECTOR, NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION, THE AMERICAN LEGION; ACCOMPANIED BY: SAMUEL J. WALSH, ASSISTANT DIRECTOR, NATIONAL LEGISLATIVE COMMISSION, THE AMERICAN LEGION; AND ERIC L. HIRSCHHORN, ESQ., COUNSEL

Mr. SOMMER. Mr. Chairman, I will be as brief as possible.

We appreciate the opportunity to speak in support of H.R. 5039 this morning. For a number of years, the American Legion has been taking a close look at the adjudication process of veterans' claims, particularly in recent years since the Department of Veterans' Benefits has been suffering severe staffing reductions in the field offices.

In our judgment there are a number of chronic problems, administrative and budgetary, which impact on the quality and the timeliness of the processing of claims. There are also problems that exist within the Board of Veterans' Appeals. Through H.R. 5039, we have proposed improvements in a number of areas that we consider to be troublesome.

Title I of this measure relates to the development and presentation of claims generally. It addresses adjudication procedures, notification of claimants' rights, reopening of claims, responsible attorney fee increases, rulemaking, and limited judicial review, as well as several other items of importance.

Title II of our bill establishes a totally independent Board of Veterans' Appeals. This means totally independent from the Veterans' Administration. It also sets forth the mechanism for a number of improvements in the operations of the Board. For instance, sections 203 and 205 would authorize the Board to review issues evidenced in the record even if they are not set forth in the statement of the case or certified by the regional office of jurisdiction.

It would also set forth that the Board may, on its own motion or the motion of a claimant or accredited representative, reconsider or remand a case to correct an obvious error in the record whether or not it was presented in connection with the instant appeal.

These amendments would, among other things, alleviate a problem which adversely affects the ability of veterans to have their claims fully and fairly considered.

Mr. Chairman, the American Legion feels that H.R. 5039 is a viable and provocative approach to implementing vast improvements in the manner in which claims are adjudicated at the VA regional office level, and deliberated by the Board of Veterans' Appeals.

We urge the committee to carefully consider this measure which, we are convinced, sets forth a reasonable and balanced approach to guaranteeing the rights of individual veterans while reserving judicial oversight for those issues potentially affecting large numbers of claimants.

I might add—just to clarify something that was brought up earlier—when a statement was made that all of the major veterans organizations have changed their positions. I would just like to say that the American Legion has never been opposed to judicial review of VA regulations or constitutional issues. That is what we have set forth in this bill, so that is certainly not a change in position.

That completes our summary, Mr. Chairman.

[The prepared statement of Mr. Sommer appears on p. 299.]

Mr. EVANS. Thank you.

VFW?

STATEMENT OF JAMES N. MAGILL, DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES

Mr. MAGILL. Thank you, sir, for the opportunity to present the views of the Veterans of Foreign Wars with respect to a number of bills which provide for judicial review of Veterans' Administrations benefit determinations.

The VFW is acutely aware of the fact that the VA is one of the few client agencies whose decisions are final, with no further legal recourse available to its claimants.

However, the VFW also has long held that an unfavorable decision by the Board of Veterans' Appeals should not be subject to any type of civil action or review. It was the VFW's fear the court relief obtained by a relatively small number of claimants would have a profoundly adverse affect on the majority of veterans served by the VA because of the resultant changes in its policy, disruption in its adjudication process, and introduction of the adversarial atmosphere associated with civil court proceedings.

The VFW realizes that BVA is coming under even greater pressure to improve its timeliness in processing cases while at the same time having to contend with the increasing complexity of these cases. The VFW commends BVA for still managing to render decisions which are fair and equitable for the most part. Human nature being what it is, however, errors in judgment will still be made on occasion.

The VFW has adopted a position supporting judicial review of VA benefit determinations only in instances concerning questions of law and regulation.

The VFW believes this carefully circumscribed position allows a proper means of redressing erroneous VA benefit determinations through the courts while not threatening to undermine the VA's own highly successful appeals mechanism. By exclusively limiting judicial review of denied VA benefit claims by the appropriate court to questions of law and regulation, the VFW believes the flood of cases into the Federal court system along with a consequent impairment of BVA workings will be avoided.

Since the VFW is mandated by resolution to support judicial review only in cases concerning questions of law and regulation, we cannot support legislation which provides for judicial review of questions of fact in individual benefit determinations.

The VFW believes that S. 2292 more closely adheres to the mandates of our current resolution. As called for in VFW Resolution No. 628, the bill provides for judicial review of law and regulation and would not allow a challenge to a VA decision involving a question of fact.

The need for this limited form of judicial review called for in our resolution is certainly apparent. There can be no doubt that no group of Americans are more deserving of access to the American judicial system when it comes to entitlements and benefits than this Nation's veterans. But opening the VA adjudicatory system to unrestricted civil court review would overburden the courts and would fundamentally alter this system for the worst and ultimately harm the veteran.

I would like to add this: When I talk about overloading the courts, I would like to make it clear that what I mean by that is that we believe in the veteran. We don't want his case to be dragged out year after year after year. I think we also have to understand that if a case goes to court, that does not necessarily mean that the courts will automatically overturn the VA's denial of it at BVA.

This concludes my statement. Once again, the VFW wishes to thank you for holding this hearing. As indicated, we believe S. 2292 best fulfills the requirements of our resolution. We further believe it would satisfy most Members of the Congress; but, what is most important, it would best serve the veteran.

Thank you.

[The prepared statement of Mr. Magill appears on p. 308.]

Mr. **Evans**. Thank you very much.

The intention of the Chair is to go to the chairman of the full committee and then to Mr. Burton for two individual questions. Then we will recess for this vote. We'll come back and then yield to the members in the order that they came in. I'll be deferring until I do get back.

Mr. Chairman?

The **Chairman**. Thank you very much, Mr. Chairman.

My question is to each of the veterans organizations. Just a brief answer will do.

You have heard earlier witnesses respond to the question about an Article I Court. In your view, will the establishment of an Article I Court as proposed by the Judicial Conference satisfy your membership?

We will start with you.

Mr. **Heilman**. In answer to your question, our primary concern is not to formalize, legalize, or change in a fundamental way the system that we now have, which we believe is generous and efficient. It is built on a mutual trust between the Agency and its beneficiary. That's the way it should be. Because of that, we have taken the approach in S. 2292 that we have, the creation of an independent Board of Veterans' Appeals. I alluded earlier to this rheostat factor of not approaching an Article I Court.

Our primary concern is that fact review of individual benefit determinations—and all that we say that it would cause in terms of the ripple affects to the system—not be done by Article III courts.

If the question is: Could we support an Article I Court for resolution of these differences, factual questions as well as rules and regulations, I'll say, yes, so long as—in terms of the factual benefit determinations—they stay in the Article I Court and they do not go from there to the Federal Court.

The CHAIRMAN. Mr. Magill?

Mr. MAGILL. Yes.

Although we have no resolution which calls for a court to be named, I believe that an Article I Court would be acceptable to the members of the Veterans of Foreign Wars.

The CHAIRMAN. Thank you.

Mr. SOMMER. Mr. Chairman, in the American Legion's approach, we expressly decided not to call it a court, although it would establish a totally independent Board of Veterans' Appeals. Independent, that is, of VA regulations, administrative decisions, general counsel decisions, and the like. In essence, what it would be is an Article I Court. However, it would still be called the Board of Veterans' Appeals.

The CHAIRMAN. But if it was an Article I Court you wouldn't object to it?

Mr. SOMMER. No, sir.

The CHAIRMAN. Okay. Thank you.

Mr. EVANS. Mr. Burton?

Mr. BURTON. Thank you, Mr. Chairman.

It sounds to me like after all this haranguing for the past couple of years, there may be some middle ground that we can all agree to that's not in the existing legislation that's before us today.

I have been on the verge of supporting judicial review for the past several years. I have not because I've been very concerned about the problems that they've eluded to previously. But I've had a number of my veterans—as I think every member of the committee has—that have fallen through the cracks. Some have been very severely affected, adversely affected over the years. I won't go into specific cases, but it has been very inhumane the way some of them have been treated. There should be some kind of appeals process.

So I would just urge the Chairman—and I'd be happy to work with Chairman Montgomery, Ranking Republican Solomon, and everyone else on the committee to come up with a new piece of legislation that would deal with an Article I Court so that we could finally have some resolution of this problem. We do have veterans that are falling through the cracks. This seems like a logical solution to the problem, Mr. Chairman.

I don't have a question. I think the Chairman asked the question for me.

Thank you.

Mr. **Evans**. All right.

We will recess until the end of the vote. We will come back and then yield to Claude Harris.

[Recess.]

Mr. **Evans**. The committee will come back to order.

We'll now ask Mr. Burton if he has any other questions.

Mr. **Burton**. No questions.

Mr. **Evans**. Jerry Solomon was here. Do you have any questions Jerry?

Mr. **Solomon**. Thank you, Mr. Chairman.

I just wanted to apologize to the witnesses for missing their testimony. I had already read your testimony. I just wanted to commend you on it. It looks like we are making some good progress. We really do appreciate all of your efforts. Without it, we certainly wouldn't get anywhere. You've been a great help to us. Thanks again.

Mr. **Evans**. The gentleman from Indiana?

Mr. **Jontz**. Thank you, Mr. Chairman.

Let me thank each of the witnesses for their help.

Mr. **Evans**. Can you turn on your mike?

Mr. **Jontz**. I think it is turned on. I'll speak a little louder.

I was interested this morning in Congressman Evans' question about the VA suing veterans. I wonder, does it bother any of you—and I'll ask each of the groups to respond—that the VA takes thousands of veterans to court each year. Yet the veteran is unable to sue the VA. Would anybody like to comment on that observation?

Mr. **Heilman**. Yes, sir.

I do have some comments. I appreciate the fact that you brought this point up.

A couple of observations that I believe are correct—and certainly if they're not, I'm sure they will be corrected for the record by some subsequent witnesses—we're talking about, I believe, primarily, indebtednesses that are incurred by veterans overpayments in the compensation, pension, and educational programs. These are the vast bulk of suits that are brought by the Agency against the veterans.

They have been, in effect, overpaid. It's also my belief that in many, many of these cases, the veteran may well be claiming that he did not incur this indebtedness, and that the VA is incorrect. Or not arguing that point, but putting in for a waiver of repayment of the indebtedness, saying that to repay would cause an extreme financial hardship on his part, and making application for the waiver.

But be that as it may, these are the types of cases where the VA has overpaid and is seeking to recover the money. I will disagree with the statement that has been made that when a case of this type is handed over to the Justice Department and they decide to pursue and bring the veteran into court—I'll be corrected if I'm in error—that the veteran certainly has a right to hire an attorney to defend himself against this suit, number one.

I would also disagree with—again, in reference to a subsequent witness who is talking about this issue in their testimony—VVA. I believe I'm paraphrasing correctly that they said the veteran is denied or doesn't have counsel before a suit of this type. Even if conclusive evidence is presented to the judge that there was no overpayment and he has no indebtedness, the judge has no choice whatsoever but to order him to repay the debt that conclusive evidence shows that he did not incur. I'm flabbergasted by that statement. I think it's totally incorrect.

Mr. JONTZ. Could I inquire?

Mr. HEILMAN. Yes.

Mr. JONTZ. Does your group provide any legal representation to such veterans?

Mr. HEILMAN. Our national service officers are not attorneys. We represent before the VA with something of this nature. We will represent if a veteran is contesting this within the Agency and claims that the indebtedness was not incurred and it's totally incorrect. Or if he is requesting a waiver, either wholly or partially, we will represent there. But if we're getting into court, we cannot. We're not attorneys. We do not represent there.

Mr. JONTZ. So there's an administrative process which sometimes works to the satisfaction of the VA and sometimes it doesn't. When it doesn't work to the satisfaction of the VA, they take the case to court. Is that right idea?

Mr. HEILMAN. I believe that's correct, sir.

Again, I'm sure the VA witnesses can expand on this. I believe there's a policy if the indebtedness is $600 or more, that those cases are generally referred because they figure it's worthwhile pursuing.

Mr. JONTZ. So the VA doesn't have to take the case to court.

Mr. HEILMAN. That's my understanding.

Mr. JONTZ. But when they're not satisfied with the administrative resolution of the case, they have the option of taking it to court. Is that right?

Mr. HEILMAN. My understanding is the VA will do all that they can to pursue administratively the recoupment of the indebtedness that has been incurred. They also can consider a waiver, either wholly or partially.

Mr. JONTZ. So sometimes in the judgement of the VA, the administrative process does not result in a just resolution. What I find hard to understand is if the VA's internal process sometimes doesn't work to the satisfaction of the VA, why don't we also have some cases where the VA's internal process doesn't work to the satisfaction of the veteran? Why should the veteran have less right to appeal the case than the VA has? That is what I don't understand.

Mr. HEILMAN. The central thrust of our opposition to fact review is that from a cost/benefit analysis standpoint, Federal court review of individual benefit determinations may well result in a few veterans gaining entitlements that were denied administratively by the VA. But the adverse impact, affect, and the fundamental change that's caused in the system—tightening up the system, making it more adversarial—is going to impact and deny benefits to a far larger number of veterans.

Mr. JONTZ. Why doesn't the VA's ability to go to court result in an adversarial situation? I would think that if going to court results in all of this horrible expense and adversarial characteristics of the process, wouldn't the VA's right now to go to court create these same problems?

If the VA has the choice—and they can do a little calculation and say, well, it looks like it's in our benefit to go to court because we think what we can recover is worth the effort—why wouldn't it be fair to give the veteran the same ability to put pencil down on paper and say, well, look, I think what my potential recovery is is worth the trouble and effort? No one is forcing the veteran to go to court, but it's an option that he has.

The VA now is given the choice. If they think it's in their best interest to go to court, they can. But the veteran is not given that choice. I don't understand if the VA's ability to hire an attorney and go to court doesn't pollute the system, why the veteran hiring an attorney to go to court would pollute the system? That I don't understand.

Mr. HEILMAN. Because there's no involvement in the system of attorneys and the effects of Article III courts substituting their judgement for the five million plus questions of fact determinations that are made each year by the VA. You don't have that impact on the system in this instance.

Mr. JONTZ. Mr. Chairman, my time has expired.

I do want to thank Mr. Heilman for his response.

Mr. EVANS. Thank you.

The gentleman from New Jersey?

Mr. SMITH OF NEW JERSEY. Thank you, Mr. Chairman.

I want to welcome our panel from the veterans organizations.

I have a couple of questions. As you know, gentleman, S. 11, as it passed in the Senate, states that a court would not overrule a Board of Veterans' Appeals decision unless it was utterly without foundation. My question really is: Is that kind of standard realistic? Does it raise the possibility, or will it raise false hopes among our veterans that they have a real shot at that appeal level?

Jim?

Mr. MAGILL. Yes. I would have to agree with that.

Speaking for myself, I don't know of a decision that has ever been rendered that has been without foundation at some point. Also, as I mentioned before in my prepared statement, I think a lot of people think that once a decision has been rendered by the BVA and it's against the veteran, that all he has to do is take it to court and the court is going to automatically overturn it. I think that's totally wrong. I don't foresee the courts overturning in all the cases. It has to be made clear to the veteran that he shouldn't have false hopes.

Mr. SMITH OF NEW JERSEY. Isn't "utterly without foundation" a new standard that is being promoted?

Mr. HIRSCHHORN. Yes, it is a new standard.

I think that in the past the narrowest standard of fact review known to Federal law has been that in selective service cases, which is "basis in fact." This standard appears to be narrower than that.

Just to echo what Judge Arnold said, it is hard to imagine many instances, indeed more than a few, where a court applying this standard would overturn a factual determination.

Mr. Smith of New Jersey. I have one final question. Did the Senate, as far as you know, in any of its bills consider creating an Article I Court? I think, as you probably can detect from this committee, there is a growing and budding interest in that as a potential solution.

Mr. Zengerle. Mr. Congressman, I think one of the conceptions that is rather flexibly interpreted in the Executive Branch operations is the concept of an Article I Court. There have been commentaries in the literature that have even gone so far as to call agencies that make adjudicative decisions Article I Courts in drag. So when you are talking about Article I Courts, you can start with an agency and go all the way up to something that calls itself a court, like the Claims Court, the Tax Court, and so forth.

I think, therefore, that S. 2292—which proposes an independent Board of Veterans' Appeals appointed by the President, confirmed by the Senate, its Chairman, members, and so forth—would suggest further movement along the continuum of something that is called an Article I Court. In fact, it would be considered to be an Article I Court even though it is only called a Board of Veterans' Appeals in the bill.

Mr. Smith of New Jersey. Thank you very much, Mr. Chairman. I yield back the balance of my time.

Mr. Evans. The Chair now recognizes Claude Harris.

Mr. Harris. Thank you, Mr. Chairman.

I understood from your testimony that all three organizations are supportive of some sort of judicial review of law and regulations in the Federal court. Is that correct?

[Affirmative agreements.]

Mr. Harris. All right.

If you get into the situation of an Article I Court, without getting into a problem of definitions right now—I believe that Mr. Heilman has already answered this question, but I would like to ask it of the others. Should we have that type court. Would you support a fact-finding mission there with any appeal on that being on just law and regulation?

Mr. Hirschhorn. That's exactly what H.R. 5039 provides, but it does not call it a court. That is the only significant difference.

The Board of Veterans' Appeals under H.R. 5039 would have full review of the facts, as indeed it does today. An appeal from there to a court of appeals would examine only questions of law and regulation.

Mr. Magill. As I stated before, we do not, in our resolution, call for a specific court. But we certainly could support a Court of Veterans' Appeals.

For the past five to six years, the voting delegates to our conventions have passed resolutions calling for judicial review only in cases concerning interpretation of law and regulation. At this particular time I could not say that the membership would support fact. We have not done so in the past.

Mr. Harris. That is all the questions I have, Mr. Chairman, thank you.

Mr. Evans. The gentleman from Pennsylvania, Mr. Ridge.

Mr. Ridge. Thank you, Mr. Chairman.

I just inquired of a colleague whether I would be going over new ground. I apologize to all of you for entering late.

There are a couple of observations I would like to make. First of all, I had an attorney on my staff take a look at the different standards that are applied in administrative proceedings just to see—as my colleague, Congressman Evans, and I have been trying to work together to find a standard—because "utterly without foundation" wasn't very appealing to me. There was a lot of confusion as to what that means legally, if anything. Certainly, there was no precedent for the use of that.

We took a look at arbitrary, capricious, and rational, factual basis, some of the standards that are out there. I would like, just for my own recollection, for you to remind me in the legislation you support what the individual standards of review are. What is the standard that will be used for review? What is it in S. 2292?

Mr. HEILMAN. Well, in S. 2292, and if we are talking about questions of fact, our creation of the independent Board of Veterans' Appeals as we describe in our testimony and commented earlier, would handle, of course, as it does now, all questions of fact, in addition to being able to challenge rules, regulations, and general counsel precedents.

We do not propose fact review in any Article III court. Therefore, we have created no standard to deal with that question.

Mr. HIRSCHHORN. The same is true with respect to H.R. 5039.

Mr. RIDGE. Very good. Thank you.

I want to deviate a little bit and talk about—unless it has been discussed before—legal fees. Has that subject been brought up in interrogation?

Mr. ZENGERLE. Congressman Ridge, if I might just add briefly to Mr. Heilman's response to your previous question.

Mr. RIDGE. Yes.

Mr. ZENGERLE. As you consider the possibility of fashioning some kind of tribunal that might work a compromise, I think you put your finger on an extremely important point about the standard of review that that ultimate tribunal ought to adopt.

Mr. RIDGE. Right.

Mr. ZENGERLE. It does seem to me that to the extent that DAV has extreme concerns about the reverse engineering effect on the adjudicatory system below the tribunal's level, that an appropriate construction of that standard could operate to minimize those adverse effects looking backward on the system.

Mr. RIDGE. All right. Thank you for your comment. I think you are absolutely correct.

I think it is very important that whatever standard we fashion be something that is reasonable, something with aces, and something certainly different than "utterly without foundation." I don't particularly care for that statement.

Mr. HARRIS. Would the gentleman yield on that point?

Mr. RIDGE. Yes. I would be pleased to.

Mr. HARRIS. It looks to me like if you are talking about standards, we ought to look to some of the other administrative procedures and find one that has already been interpreted rather than create a whole new area for judicial review of that.

Mr. RIDGE. If the gentleman would permit me, one of the things we found in our research is that depending on the issue, depending on the facts to be analyzed, even arbitrary and capricious can. There is a very broad definition with a very wide margin of interpretation in the courts as it exists today.

All I want us to be sensitive to as we fashion an alternative—and the dispute remains whether it be a review of facts, laws, and regulations; laws and regulations; or some combination thereof—whatever standard of review that we provide in the legislation be meaningful and provide the kind of aid to the veterans we are trying to help, and also have a rational basis in law.

I think we do have to look at some of the legal precedents, the Administrative Proceedings Act, and a few others maybe to get some guidance.

Mr. RYAN. Mr. Ridge, I just wanted to clarify. The Veterans' Administration will testify later today that the standard of review which the Board of Veterans' Appeals uses is, in fact, *de novo* review of the decision of the Veterans' Administration. Unless I am mistaken, both S. 2292 and the American Legion bill would not alter that standard.

Mr. RIDGE. I appreciate the clarification.

Briefly, since I have a little more time, some of us also feel strongly that while we are dealing with the issue of judicial review we should deal straightforward with the issue of legal counsel. The minibus fee is outdated and we have to do something about it.

Would you express for me your support or rejection of some kind of cap—be it a percentage or dollar amount on past due benefits—that would be paid to an attorney whom a veteran employs, engages—

Mr. HEILMAN. With respect to our support for 2292, we do propose payment of reasonable attorney fees for private attorney representation that's given before our independent BVA on questions—on issues relating to challenges to rules and regulations and also, of course, reasonable fees for attorneys should those type of challenges go from the independent BVA into the Court of Appeals.

Mr. MAGILL. Again, referring to our resolution that was just adopted a couple of weeks ago, we also would support a reasonable attorney fee established by the Congress. In 2292, of course, it's very rare whenever you have a piece of legislation that you can agree with line-for-line. I think we all know that.

We are concerned on the 25 percent past due. It's not that it's an obstacle, but we have concern. If you have a case that goes back years, and years, and years, you may come up with a settlement that may not be considered reasonable. Now, that's a concern that we have. We think it can be resolved.

Mr. SOMMER. Under H.R. 5039, three criteria would have to be satisfied before any lawyer could be paid for handling a claim. First, the lawyer and the claimant would have to have an agreement permitting such fees. Second, regardless of what such a fee agreement provided, the fee could not exceed the greater of 25 percent of the past due benefits or $500. In a case going all the way through the Board of Veterans' Appeals and on to the Court of Appeals, that would be $750. And the Administrator would have to approve the fee as reasonable.

Mr. **Ridge**. I appreciate that. And I just, again, as we're looking to the issue of judicial review, a concomitant issue is clearly one of legal representation. I'm glad there is basic agreement that we need to do something about the fee. I like the idea that a percentage approach is basically satisfactory to all of you.

I, for one, think that it should be an either/or percentage, but the dollar cap should be a little bit higher than the $750. From my point of view if a veteran has been out there laboring for five, and six, and seven years, and would receive past due benefits, it's obviously tremendous obstacles that both he and his attorney are going to have to overcome. And I would prefer to legislate it in that fashion rather than leave it up to reasonable attorney fees, because what's reasonable in Erie, Pennsylvania, I guarantee you, is not reasonable in Washington, D.C.

So, I appreciate your support of that and your candor in responding to the questions.

Thank you.

Mr. **Evans**. The gentleman from Massachusetts.

Mr. **Kennedy**. Thank you, Mr. Chairman.

First of all, I'd just like to welcome all of you. And, basically, the questions that I have this morning really have to do with some of the concerns that have been raised, I think, lately by outside organizations with regard to the overall level and quality of the advocacy that many of your organizations provide. So, I don't want to single one of you out and suggest that there's been a hit made on you. But the fact is that they have done so, and I just want to give you an opportunity to respond to the charges that have been made.

And from a personal point of view, up in Massachusetts I hear directly from veterans who feel strongly that your advocacy has been a tremendous help to them. And my office has received many phone calls, so I don't need to hear any more about what a fine job is done.

But I'm sure you're aware that in this past August issue of the Virginia Law Review mentioned that by standard practice service representatives submit only a one or two page brief, frequently written by the claimant themselves, before the Board of Veterans' Appeals, and that an overwhelming majority of BVA hearings are handled through the submission of "informal hearing memoranda" in which the claimant never meets his representative. First could you explain what an informal hearing memoranda is? And, second, would you agree with the statements and consider this with the context of information from the BVA, indicating about a 14 percent approval rate of cases that actually go into this court?

So, I'm just trying to understand what the real situation is versus what the anecdotal information is, which we get an awful lot of.

Mr. **Sommer**. Well, I can only speak for the American Legion, but as far as the number of veterans who come to the Board of Veterans' Appeals for a personal hearing, that's entirely up to the veteran, because every veteran is given the opportunity to come in for a personal hearing, or to have a hearing at the Regional Office level.

So, I don't know on what basis that article was written.

Mr. **Kennedy**. The article didn't have to do with the Regional Office level—the article had to do with the cases that go up to the BVA. And they're saying that in those cases that the averages of one or two page briefs, frequently written by the claimant themselves, and that the overwhelming majority of BVA hearings are handled through the submission of "informal hearing memoranda" in which the claimant never meets with his representative. So that's where, you know, what I'm trying to find out is what the real effectiveness of the system that is in place is, and with a 14 percent approval rate—I mean, tell us.

Mr. **Heilman**. In terms of the DAV, when an appeal is forwarded, once the statement of the case has been issued and a notice of disagreement has been filed, a statement of the case has been issued, at that time, first of all, the claimant, and it's still back at the local level, the claimant is given what's called a Form 1-9, which he can make arguments himself that would accompany his appeal to BVA, but also at that time, the local NSO representing him is given a 646, and DAV policy is that in addition to the claimants comments on the 1-9, our NSO's fill out a 646 and make their own arguments on behalf of the claimant.

I can't—and understand that I have been out of the field for 15 years. I was an NSO, but I've been in the legislative branch for 15 years. I can't comment on whether it's a one, or two, or three, or four, or five page 646 that accompanies the file to Washington.

Mr. **Kennedy**. And I think that isn't the central thrust of the question.

The Law Review article went on to say that on the few occasions—I'm just quoting directly from this article—"on the few occasions when the claimant does appear before the BVA, in a hearing, generally the first time he meets with his service representative will be just 30 minutes before the actual hearing."

Mr. **Heilman**. If a claimant comes to Washington for a hearing, of course he very well may have, maybe he didn't, but he very well may have had much face-to-face contact with the NSO out in the field when he comes to Washington for his hearing, if he's asked for a hearing and one is scheduled. It's true, often times he'll come the day of the hearing and he'll show up that day, two hours before the hearing, and he'll sit down with our appeals National Service Officer—we have an office here in Washington that handles nothing but appeals to BVA—

Mr. **Kennedy**. The only point I was trying to make is that I think if it were my future on the line, in terms of whatever income that I was looking forward to, I would like to be able to talk to somebody for more than 30 minutes, and have a greater degree of knowledge about that—

Mr. **Heilman**. Well—

Mr. **Kennedy**. [Continuing.] And in addition to other issues that have been raised. I just think that at some point, it would be well worth the while of the NSO's to take a look at that article and be able to respond.

Mr. **Heilman**. Well, I would like to take a look at it.

Just one final comment. With respect to what's the final outcome, each year there is *pro bono* representation that is provided to veteran claimants by attorneys at BVA. In 1987 there were 700-some cases where attorneys represented claimants before BVA. Historically, if you look at the stats, you can see that there's no—there's really not a dime's worth of difference between the allowance rates of the VSO's, the Veteran Service Organizations, and the *pro bono* representation that is provided by attorneys now at the Board of Veterans' Appeals.

Mr. MAGILL. On behalf of Veteran of Foreign Wars, I have not read the article. I would like to see it.

You mentioned the 14 percent and you sounded like that was extremely low, or something. I think you have to keep in mind that this case has gone through the regional office and has gone through many staffs. It may have been remanded. Again, the BVA is not going to automatically overturn a case, just because it goes up to the BVA. I think 14—

Mr. KENNEDY.—fourteen percent—

Mr. MAGILL. I mean, yes, what's wrong with 14 percent? They are looking at—

Mr. KENNEDY. Well, I'd like to see it higher. I'm sure you would too.

Mr. MAGILL. Well, exactly, but at the same time, they're not just going to rubber stamp it.

Mr. KENNEDY. I understand that, but—

Mr. MAGILL. Can I just add one additional—

Mr. SOLOMON. Would the gentleman yield after that?

Mr. MAGILL. Sure.

Mr. SOLOMON. I might just point out, Joe, that I have a similar kind of concern only I have it the other way around.

And I hate to be critical of the law profession, but all too often some of these lawyers that charge $150 and $200 an hour, they will pick up the file 30 minutes before they're going into a court room, and they don't know what the hell is going on, and they give very bad legal representation. A National Service Officer, I will bet you, that 99 percent of them have already reviewed, they've got 5 million cases out there with backup precedent on, and they get much better service. I think that's where the whole argument here is.

So, you have to worry about the kind of legal representation they're getting as well, as to what they're getting now. I just wanted to point that out.

Mr. KENNEDY. Yes, I think that's a good point, Jerry, and I don't want to be sitting here trying to defend the legal profession, especially not being a lawyer—even then I don't think I would want to be.

[Laughter.]

Mr. KENNEDY. But, I think that the point that we're just generally trying to make, is you've still got the VA, under a system of providing bonuses to claims processes.

Mr. MAGILL. Not any more.

Mr. KENNEDY. That's changed?

Mr. MAGILL. Yes.

Mr. KENNEDY. Well, it doesn't take away from the fact that from this article, which is Volume 74, August 1988, Number 5, if you're interested in checking it out, this article is a fairly tough indictment of the NSO method of advocacy within the veteran structure.

And if we're undergoing a hearing with regard to whether or not that's working well, it seems to me that we ought to be able to answer the suggestion that if we go to lawyers we can have an even worse system.

I would think that what we'd want to do is make certain that people are getting quality, decent advice from the organizations that they depend on to advocate for them within the VA, regardless of how you come out on the whole issue of judicial review. And this article is fairly tough, and I think well worth hearing some responses, with regard to the specific attacks that are made.

Mr. **HEILMAN**. What we really need, Mr. Kennedy, and I'll agree with what you just said, is—and we haven't had it, it's been brought out before, there's never been an empirical study, an analysis done, of what goes on at BVA. We see and hear anecdotal charges of terrible decisions, and articles in journals, or whatever. There's never been a study, never. We need a study.

Mr. **KENNEDY**. I would think, Mr. Chairman, that might be well worth looking at.

Thank you.

Mr. **EVANS**. Thank you.

The gentleman from Florida.

Mr. **BILIRAKIS**. Thank you, Mr. Chairman.

Let me ask the question of the panel. Do you favor the option of a claimant being able to use an attorney? I mean, do you feel that they should retain that right? They really don't have it now, because what is it, $15 or $10, or whatever it is that fee is. It's other than *pro bono* cases that you've mentioned. So, I mean, do you feel that an attorney should be a viable option for claimants?

Mr. **SOMMER**. Speaking for the American Legion, that's why we built into H.R. 5039, what we feel is a responsible increase in attorney fees, so that a veteran can make a choice. They have an option, whether they want a service organization representative, or an attorney to represent them. And we feel that the attorney fees that are built into our bill are responsible enough that they would be able to get an attorney to represent them if they wanted to.

Mr. **BILIRAKIS**. Is that basically the way the rest of you feel?

Mr. **MAGILL**. Yes. The Veterans of Foreign Wars, we believe that if a veteran wants the choice, he should have it, and we have expressed that, again, in a resolution calling for a reasonable attorney fee.

Mr. **HEILMAN**. Again, we believe that reasonable fees should be paid for attorney representation on the legal questions, rules and regulations, under our proposal, under 2292, where attorneys can employ their admitted expertise and skill, not on questions of fact.

Mr. **BILIRAKIS**. That's clear. But I would say to you, to sort of follow up on the comments and questioning by Mr. Ridge, the gentleman to my right, that you're not really presenting a realistic, practical option, if you're talking about a maximum attorney fee of something like $500. Now, you know we're talking about a fixed fee up to a maximum, or the contingent portion. And you really—you're really going to the contingent portion. The fixed fee amount is really not a realistic option.

I would suggest to you, and I think you probably would be finding 99 percent of the attorneys going on the contingent, and that may be a fair figure, the 25 percent, you know whatever it is, it may be a fair figure, it may not be. But I would suggest to you that if you really intend attorneys to have a reasonable, practical, realistic option, and if you intend that he or she, in fact, have a practical, realistic option, they must choose one versus the other. And I realize that the terminology in fees is somewhat different here, depending on the piece of legislation, that you probably ought to be talking about a higher figure there. And again, keeping in mind, and agreeing with you, John, and I heard from you yesterday, that the service officers do a pretty darn good job, at least statistics seem to indicate they do as good a job as an attorney would. And certainly I agree with Mr. Solomon, attorneys generally are busy people and they've got a million and one cases going on all at the same time, but that's up to the individual veteran, the confidence he may have in an attorney of his choice.

Having said that, I would just merely finish up by commending you gentleman. And in the process of commending you, of course, commending the representatives from NCOA, of which I am a member, and BVA, and PVA and the other groups. If only our fellow veterans back home, there are those that the highest percentage—80 percent, or whatever the percentage is of veterans that are not members of any of the veterans' organizations who don't get the magazines and bulletins that don't really know what you do up here. If only they realized the job that you do for them, and I commend you. Thanks.

Thank you, Mr. Chairman.

Mr. **Evans**. Thank you.

The gentleman from Georgia.

Dr. **Rowland of Georgia**. Thank you, Mr. Chairman.

I have just a question I want to ask. When I came in a few moments ago there was an exchange taking place between Mr. Jontz and Mr. Heilman, relative to why was the Veterans' Administration allowed to sue a veteran on a delinquent loan, but yet opposition to a veteran being able to go to court in the case of a claim. Is that what you were discussing when I came in a few minutes ago?

Mr. **Heilman**. Yes, sir.

Dr. **Rowland of Georgia**. Let me ask this question, then. I'm not an attorney, so it seems to me there's some difference between that, because in fact before it gets to court isn't it determined that the veteran actually owes that loan, so that's not a debatable issue at all, whereas the veteran is trying to establish whether or not he has a valid claim. So isn't there a difference between those two?

Mr. **Heilman**. Yes, sir. It was brought out in our discussion that in those cases that do go to court, where the Justice Department has had the claim referred to it, and takes the veteran to court, that they have run the gamut of the administrative proceedings, and the veteran has possibly claimed that the overpayment is incorrect or erroneous, or wasn't his fault, or whatever, and if the VA contends that and denies that, and says yes it was, well, you know, that decision at least by the agency has been made. That record has been looked at by the time it gets to court.

Dr. **Rowland of Georgia**. So, in the case of an educational loan, for example, once that goes to court it has been established by the

Veterans' Administration that the individual, to their satisfaction, does owe the loan?

Mr. **Heilman**. Yes, sir.

Mr. **Magill**. Sir, if I could just add one thing. It's my understanding that the VA bends over backwards to try to rectify an outstanding loan. Many times they will contact that veteran trying to work out a payment plan of some kind. In a lot of cases, some that I'm aware of, the veteran just refuses to acknowledge it. And we believe that if a loan is made in good faith, that veteran has an obligation to repay the loan.

But I would like just to add that the VA does not just all of a sudden slap that guy in court. They do attempt to work out a schedule so that it would not be a very large financial burden on the veteran.

Dr. **Rowland of Georgia**. I was a recipient of a loan when I came out of service and went back to school. And I'm very grateful for that. And I find it especially distasteful when a veteran has a loan for an education, completes his education, goes out and begins to earn a living, and then refuses to repay that loan. And that's true with anybody that borrows from the Government and doesn't repay it.

Thank you very much, Mr. Chairman.

Mr. **Evans**. The gentleman from Texas.

Mr. **Bryant**. Thank you, Mr. Chairman.

I would just like to say at the outset, I wish I had been here during your testimony. I'm not sure what everybody testified to. Let me just say this. I speak to a lot of veterans' organizations at the local level. And for the period of time that I've served on this committee, which has been five and a half years, the opinion of my local veteran organizations' membership about this issue has been completely different than the opinions that have been expressed by you fellows when you come up here and talk to this committee.

The folks back home have absolutely no doubt that they want judicial review, none whatsoever. They have absolutely no doubt that it seems unfair that a veteran would not be allowed to go to court to get the benefits that he might be entitled to by law. And it continues to amaze me—maybe it shouldn't, other national groups have this dichotomy too, but that you all are never as stout in your defense of the right of a veteran to go to court to get what is duty is, as the members of your organization back home where the local meetings are. Boy, there's no doubt in my meetings, and I'd invite you to come down there and stand before them and give this rather lukewarm endorsement of the notion that they should go to court to them and see what the response is. I think you'd be surprised, and it wouldn't hurt anything for you to get that grassroots point of view.

Mr. **Magill**. I'd like to respond to that, if I may.

Mr. **Bryant**. If everybody would, why don't we just go left to right here.

Mr. **Magill**. All right.

Mr. **Heilman**. I think we've demonstrated that this issue is a complex issue and an emotional one. And it's not surprising to me that, as you claim, there's a substantial number—you say, all or the majority, or whatever, of veterans who indicate that yes, I'd like my day in court. Because it sounds like an apple pie issue, and on the face of it, it sounds reasonable, it sounds just, but it's not a black and white issue, as I think has been demonstrated by all the witnesses today.

In terms of doing what your veterans want, what your constituents want, certainly that's primary to any Member of Congress, but you also have a responsibility to act in their best interests. And that may, in fact, collide with what a constituent or a number, or a majority of your veterans want. Some years ago, before you came to Congress, there was an idea being kicked around about instead of paying 10 percent service connected disability to an individual for his entire lifetime, and that, of course, is the lowest amount that you can receive—I think the current rate is $68 a month—there was a thought of well, there's an administrative cost in paying these checks and when the disabilities are static, why don't we, in cases where the veteran files a claim and the disability is only 10 percent, why don't we give him a one lump sum, say $10,000, and pay him off. And that will be the extent of the Government's liability to this veteran for that service connected disability.

Out in the field amongst veterans, that's very, very popular. If you're going to say to a fellow, would you like $68 a month, or would you like $10,000. He's going to take the $10,000 and forget about the increased disability down the road. He's going to forget about medical care. And the fact that in the short run he might have $10,000, in the long run he might lose a heck of a lot more.

My point is obvious. I would hope that after careful consideration of what's been said here today, that your consideration would be what's in the best interest of veterans and the system. We contend that it's not judicial review of factual determinations as proposed by S. 11.

Mr. BRYANT. But let me ask you a question. What has caused your organization, or any of you, to decide that some form of—I've heard this phrase over and over—some form of judicial review is now necessary? What's changed?

Mr. HEILMAN. Well, first of all, in the current debate that goes back 10 years, it's been stated that our organization, DAV, for example, has changed. If you look at the record going back to 1979, with the first Senate bill, S. 330, we have always opposed factual determinations in the Federal District Court system, and removal of the $10 fee limitation and invitation of private attorney involvement throughout the VA system, especially at the regional office level. We have been consistent in that position for 10 years.

Some years ago, up until recently, we did support a specialty court, at Article I Court, if you will. Three years ago, that position changed, primarily because it was being charged that we were not fulfilling the obligations of our members, and we dropped the specialty court proposal three years ago.

Last year, we—after scrutiny and—

Mr. BRYANT. We're running out of time here. I just want to know what has changed to make you say now that you need some form of judicial review. That's the question I'd like to put to you.

Mr. HEILMAN. Because in the question of law and regulation, I guess we have changed.

Mr. **Bryant**. Well, have you decided that the VA may not be doing exactly the perfect job you'd like them to do, maybe there's some—

Mr. **Heilman**. I'm sure the VA isn't doing a perfect job.

Mr. **Bryant**. Okay.

Mr. Magill, what's changed with the VFW?

Mr. **Magill**. Well, if I could go back and respond with that you said, you know, with your original statement—

Mr. **Bryant**. As quickly as you can, because—

Mr. **Magill**. Well, you made some accusations, sir, that—

Mr. **Bryant**. No, no, just a moment. Let's get this straight. I made no accusations. I told you of my observation that the membership in my county totally, 100 percent, supports judicial review, and repeatedly the organizations have not, and I'm just—

Mr. **Magill**. Well, my impression was—

Mr. **Bryant**. That's a documented—

Mr. **Magill**. Well, I'd like to respond to it, sir.

My impression was, then, that you said that we were not representing our membership.

Mr. **Bryant**. Now, I never said that.

Mr. **Magill**. I know you didn't, but that's my impression that I got, because you were saying that your people are telling you one thing, yet we're coming up here saying something else.

Mr. **Bryant**. I am saying that.

Mr. **Magill**. I would like to explain to you, if I could, and you've taken some time, and I'd like to have some time also to respond.

Our position has not changed on judicial review for the past seven, eight years. And I can show you the resolutions.

Now, this takes us to another step. We have a resolution process that our resolutions come up every year. A resolution does not carry over. It has got to be submitted at the post level, it then goes to the State level. If it advances there, it goes to national. There is debate at every time. For the past, again, seven, eight years, we have had a resolution calling for a judicial review of interpretation of law and regulation. Not one resolution has come out of the State, going to national, that has called for resolution of fact.

And I may add that most of our resolutions on judicial review that come up, are submitted by many, many departments, not just Texas, not just whatever. For the national organization to try to dictate policy to our membership, is probably one of the fastest ways for me to lose my job. We have resolutions, and I have to adhere to them. So when I come up before you this resolution that we have, that's the message that I'm getting from our members.

Now are your members—or the people they're talking to, I would be very curious—are they a member of one of the veterans' groups?

Mr. **Bryant**. Mr. Magill, I'm talking about meetings of VFW posts in Dallas County, three or four of them where I've spoken in the last two years, in which the average member—I mean, there's not a single person in the room that is not in favor of judicial review.

Now, I'm sure that your process is totally just, just like you say it is. I'm just saying, for one reason or another there's quite a different viewpoint held at the local level than is expressed here about judicial review. Maybe it's because of what Mr. Heilman said there, that it's more complicated than the average guy has time to figure out.

Mr. **Magill**. I'll agree with that.

Mr. **Bryant**. Maybe that's what it is, but I still say to you, there's a clear difference.

Mr. **Sommer**. Mr. Bryant, I'll try to be as brief as possible.

Number one, the American Legion's position has not changed. I mentioned earlier, in my summary of the testimony that the American Legion has never opposed judicial review of VA regulations and constitutional issues. Our opposition throughout the years has been to questions of fact. So our position now is nothing new.

I think what is different is that in the past we've looked at the issue of judicial review of fact, yes or no, and have not gotten into the broader issue.

In addition to that, our position on attorney fees has not changed. For the last 10 years we've been stating that we would support a responsible increase in attorney fees. So, this is nothing new. And like other organizations, our positions come through our policy making bodies. We just concluded, or conclude today, the 70th annual national convention of the American Legion. Yesterday in the report of the Veterans' Affairs and Rehabilitation Commission, the delegates to the national convention, which we have one delegate per 1,000 members from all over the world, adopted a resolution that is identical to the resolution from which H.R. 5039 emanated.

So our policy will remain the same throughout the 101st Congress.

Mr. **Bryant**. Thank you.

Mr. **Evans**. The gentleman from Connecticut.

Mr. **Rowland of Connecticut**. Thank you, Mr. Chairman.

If I may, I'd like to make a couple of observations. Number one, I think all of us on the committee, and those of us who have been on for a number of years, have grappled with this issue, and I think all of us have tried to look for an alternative. And as my colleague from Texas said, sure, there's going to be some rank and file members out there of all the organizations that are not going to agree with the various national positions. And I would say that I'm sure there are many of us, Republicans and Democrats, that don't agree with our national party platforms. And so there's plenty of room for disagreement. And that's part of the process. And we have to respond, as members representing our various constituencies, will respond, hopefully, to their best wishes.

But I think part of the problem is framing the question. If you say to someone, are you in favor of judicial review, just like Immigration or Social Security, don't you think they should have that review process, I mean, who's going to say no? What you need to do, and I think the responsibility that we have, both at your level and at our level, is to be straightforward and honest with each other and sit there and try to thoughtfully debate and think out what can work. And I think that's the point that we're coming to now. And I think there's some apprehension, too. and I don't think that the apprehension should be interpreted as adversarial positions, but rather a good natured, thoughtful way of trying to come up with some compromises. And I hope we're in that position. And

I hope there isn't any adversarial relationship between the members in the organizations, and/or rank and file.

It's a tough issue. And my personal observation is that we should walk before we run. And rather than throw the whole process out the window and throw it all into the courts, we need to work with some of the compromises and some of the provisions that are now floating around.

But, again, I think we need to be careful in how we frame the question, how we handle all of our members and all of our constituencies, and Dan Burton, I think, said it well earlier, when he observed and said that there are some people that have fallen through the cracks. There's no question about that.

But to change the entire system for the very legitimate cases that are out there, I don't think is the right way to go. And I feel very comfortable in where we're going now, and I'd love to see it happen before we get out of here in four weeks. But, maybe, what we can do, is draw a line in the sand by the time we leave this month, and when we get back start at that position and work from that position, rather than going all the way back and reframing all the same arguments and the same debate, and the same heartache. And I think and hope that that's where we come to.

I'd take any thoughts you might have on those comments, if you feel so inclined.

Mr. HEILMAN. I just endorse them a hundred percent, Mr. Rowland.

Mr. ROWLAND OF CONNECTICUT. Thank you, Mr. Chairman.

Mr. EVANS. Thank you.

Rick, you've taken some exception, as you're right to do so, in terms of findings by various other veterans that the VA system, particularly the BVA, is corrupt, but I'd like to ask you, and really all the members of this panel, just what your reaction to the Government Operations Report of August 18th was, that found, among other things, that the VA has understated the actual number of errors found in its claims processing programs, and has provided misleading data to Congress regarding the number of errors.

Second, favoritism, undue emphasis on production quotas, and the failure to consider all medical evidence in some cases, have hampered the BVA from always operating in the best interest of veterans seeking reconsideration of claim denials.

And third, the VA has discouraged agency employees who have attempted to expose unjust treatment of veterans seeking benefits.

I guess, first, do you agree with these findings, and two, how would you characterize the system if, in fact, those findings are accurate?

Mr. HEILMAN. You're not going to be pleased with my answer, Mr. Evans.

Mr. EVANS. I didn't suspect I would be.

[Laughter.]

Mr. HEILMAN. I think that hearing, quite frankly, was an exercise in intellectual dishonesty.

When that hearing was scheduled in early February of this year, the ostensible purpose of the hearing was to examine the VA claims process, both at the local and appellate level. We didn't hear about the hearing. By we, I mean the DAV, and I know the Legion and the VFW didn't either. When I did hear about the hearing, I called the committee, and I noted that this hearing was scheduled, that this was the subject matter, and I said, our organization would like to testify. And I was told by the majority staff, well, we don't want you to appear, because all you're going to do is come over here and talk about the issue of judicial review, and judicial review is not the issue for which this hearing has been scheduled. And I said, no that's not correct. I said, we'll address the issue of the claims process in the field and at BVA, and that's what we'll restrict our remarks to.

I was still told—this was about two weeks before the hearing, that our schedule has been set and you can't testify. At that point, I went to some other members of the committee, and asked them to intercede on my behalf, and then I was contacted by the committee again, and told, yes, you can testify. I also failed to mention there was a letter that we sent that went unanswered for about two weeks also, requesting to testify. When the hearing was held on February 18th, I appeared as a witness and my testimony was restricted to the very real problems, some of which you've enumerated, that we're faced with in the VA claims process now; lack of staff, lack of resources, preoccupation with end products, poor quality control—bonuses at that time, the practices were in effect—form letters that don't properly inform claimants of what their rights are, why the decision was made, that type of thing. We addressed all those issues.

Well, as you recall, Mr. Evans, you were the lead-off witness at that hearing, and your testimony talked about nothing but judicial review. And also Vietnam Veterans of America, who had been the only organization invited to testify, testified about judicial review. And the witnesses who were called by the Chairman, in addition to the VA personnel, were about four selected sympathetic, some of them cases of denials of claims, they talked about their own personal claims and judicial review.

And when I finally got to present my testimony at the end of the hearing, after sitting there for about six hours, when the room was virtually deserted, I presented my prepared testimony and then I also commented on judicial review. I think the one-day hearing that was held, and the evidence that was given at that hearing, I think for that to be the basis of the committee report, which came to the conclusion, surprisingly—or not surprisingly—of supporting judicial review of benefit determinations was foregone conclusion from the word go.

No, sir.

Mr. EVANS. Excuse me. You don't agree with any of their findings?

Mr. HEILMAN. I believe that there are very real problems. I gave you my characterization of that hearing and what it was all about.

Mr. EVANS. Anybody else want to respond?

Mr. MAGILL. I will be extremely brief, because I have to echo Rick's statement.

This scenario is about the same, although we did not testify. We did not initially receive an invitation. We did inquire, and again, it was the same thing that's been said.

We're not going to sit here and say the VA is perfect. We know that. As was mentioned before, staffing is an extreme problem. Yesterday afternoon, and yesterday night, we sat here. And it's basically funding. This afternoon, a witness here, it was very refreshing to hear somebody say, yes, I've got a problem, I need more money. We didn't get that last night.

Do I agree with the findings? Not really. Again, I think there is problems there, but at the same time, I think they knew exactly what they wanted to come out at the end of that hearing, and that's exactly what they did.

Mr. **Evans**. Legion?

Mr. **Sommer**. The American Legion did not testify at that hearing. We have not been officially provided a copy of the report by the committee. What I have seen was incomplete, therefore, I'd rather not comment on it.

I will say that we're aware of the fact that there are problems, problems do exist within the system. As far as the Department of Veterans' Benefits is concerned, and the regional offices, we've said for a number of years there are problems in the fact that there are insufficient numbers of employees to carry out the work that needs to be done, and they continue to be cut. There are problems at the Board of Veterans' Appeals that need to be straightened out administratively, and that's why we have included these things, with the exception of funding for DVB employee's obviously, but we have included provisions for improvements in both the adjudication system and the appellate system in H.R. 5039.

Mr. **Evans**. All right.

Well, let me then ask you, you all had an opportunity to testify here, I understand, if I recall correctly, in the most recent hearings we held, I guess Chairman Applegate's subcommittee on the BVA. And in that we had evidence of a bonus system existing within the BVA, a personal courtesy signature program, and a personal signature list.

Doesn't that give you at least good evidence that the BVA is less than independent, and perhaps less than correct in making many of the decisions when you have those kinds of factors involved?

Mr. **Heilman**. Yes, sir. I agree with that.

I opposed the bonus practice in my testimony before Mr. Weiss at the hearing we just talked about. And the practice of courtesy signatures and the so-called special list that gets the attention of the chairman, I'm not so sure whether that's a good or bad idea, but if indeed it means that the veteran in terms of who he knows gets special treatment, that certainly shouldn't be sanctioned.

And I agree that BVA, as it now stands, should be made much more independent from agency influence, and that's what S. 2292 does.

Mr. **Magill**. Yes, that's one of the reasons why we do support S. 2292, in that it does make the BVA much more independent than it is right now.

Mr. **Sommer**. The American Legion calls for a totally independent Board of Veterans' Appeals in our bill.

Mr. **Evans**. Do any of you have service officers who practice before the Military Correction Boards?

Mr. **Sommer**. Yes.

Mr. EVANS. Do all of you?

Mr. MAGILL. Yes.

Mr. EVANS. And DAV?

Mr. HEILMAN. Yes.

Mr. EVANS. Has judicial review harmed these boards?

Mr. SOMMER. To my knowledge, and I can only speak from my own experience in supervising the staff that operates at the correction boards and the review boards, we've not had any involvement with cases that went through judicial review, that I'm aware of.

So, I can't answer that question.

Mr. EVANS. But you do have officers that practice?

Mr. SOMMER. We have three people, yes. We have a staff of three people who represent individuals with their cases before those boards.

Mr. EVANS. All right.

Any other comments on that?

Mr. MAGILL. We also have a group that's over in the Pentagon that works. I'm not aware of the cases going to judicial review. I'd have to supply that later, if I could.

Mr. EVANS. If you could, we'd appreciate it.

Rick, anything else?

Mr. HEILMAN. The input that I've received, I'll tell you quite frankly, is not from our NSO's who operate before the boards, but from an attorney, Keith Rosenburg, and as you know, Mr. Evans, he testified before this committee two years ago, and the Senate committee recently, and I understand that his assertions of an adversarial impact had been disputed, but I guess I'm aware through him, at least, the charge that it has worked to the detriment of claims.

Mr. EVANS. I'm stepping over my time, but I just have one final question for all of you.

Now, I've talked to many of your service officers before, and we've had individuals that have fallen through the cracks as some of the previous witnesses have said, have gone through the final level of the BVA, and been denied, and when the veteran service officers, themselves, feel that this is a case in which all reasonable doubt has not been given to the veteran in terms of the consideration throughout that administrative process, just what do we do with those cases?

Say that there's not a system for those people despite the strong evidence in their case? It's just too bad, you can't go to court, say "gomen nisai," like we used to say when we were in the service?

Mr. HEILMAN. No, sir.

First of all, I agree with you that there are cases that fall through the cracks. There are good claims that are denied, meritorious claims, and we get complaints from our NSO's about this fact. And I don't want to go over plowed ground and talk about the cost benefit analysis, but that's certainly the thrust of my response.

Plus, I would also say what we do is we reopen that case, as you can under the current system, and you do it again, and again, and again, until you win it.

Mr. EVANS. I'm sorry. I didn't catch the last part. Could you just repeat your last part?

Mr. Heilman. Yes, sir. I ended by saying that we don't say "gomen nisai," but under the current system we reopen the claim and do so again, and again, and again, until we win it.

Mr. Evans. Any other comments?

Mr. Sommer. Aside from reopening the case, at the local level, we also in many occasions ask for a reconsideration by an expanded panel of the Board of Veterans' Appeals, or in many other cases request an administrative review by the Director of the Compensation and Pension Service at Central Office, on a case where there's a problem with what we feel is a misinterpretation of a regulation or statute. Then, if a case continues to be denied there, they stil have appellate rights. So there are other avenues that we do take. We don't just let a case go through once and then say, well, that's all we can do.

Mr. Evans. All right.

Thank you very much. I want to thank this panel for their also good testimony over a long period of time. Thank you for coming before us today.

Mr. Magill. Thank you.

Mr. Evans. At this time we will dismiss them, and call the next panel.

The next panel consists of Gordon Mansfield of the Paralyzed Veterans of America, Rick O'Dell and Paul Egan of the Vietnam Veterans of America, and Dick Johnson of the Non Commissioned Officers Association.

Again, all these witnesses, if you'll come forward, your statements will be entered completely into the record. We would like you to limit your presentation to five minutes, if possible.

The **Chairman.** Gordon, you were here last night, we'll call on you.

STATEMENT OF GORDON H. MANSFIELD, ASSOCIATE EXECUTIVE DIRECTOR FOR GOVERNMENT RELATIONS, PARALYZED VETERANS OF AMERICA

Mr. Mansfield. Thank you, Mr. Chairman.

First of all, I appreciate the fact that the full testimony is included in the record, and I would like to summarize that. But before I do, I'd like to bring us back to what I think we're talking about.

Everybody's talking about systems. We've got judges up here talking about the Federal Court system, and they don't have enough money, therefore, they don't want to deal with the problem. And we're talking about Article I Courts. I'd like to talk about individual veterans, because that's where the system is supposed to be working.

Individual veterans file claims, and individual veterans have their claims upheld or their claims denied. And I think what we're talking about is, given the fact that we've heard throughout this morning, and we heard yesterday, that there are problems at the VA, and we've heard that there are cases falling through the cracks, that there ought to be an opportunity for that individual veteran, who has served his Country, and has the basis for a claim, to go at least one step further.

And I think I'm concerned about some of the previous witnesses' testimony equating—you know, right down the street here is the Supreme Court of the United States, and if I remember correctly, it says equal justice under the law, and there's nothing on there about any dollar signs, or about we'll give you equal justice but it's going to be limited because of resources.

People talking about they don't want repetitive cases in that system. Let me suggest to you, from my belief, and my knowledge, and my personal experience, every veteran's claim is unique according to that individual, and the effect of what's happened to that individual.

And another thing heard here, the laboratory idea. Now what am I supposed to think about that? You're going to make veterans the rats in the laboratory? And questions about lawyers' fees. Again, back to my position that what we're trying to do is give the individual veteran the opportunity to make a choice and a decision, it's not something forced on them, and what we're saying is, you take it out of that system, and Congressman, I know what you're saying because we have changed our position as of March 1st. And the reason we changed our position is that the membership of PVA, through its elected officials, heard enough about the problems out there and said, what we need to do is find a better way.

Now, I'll agree with you that there are different ways. And this is one way. And this Government is comprised of three co-equal branches, whether one doesn't feel co-equal because they're not getting enough money. But what we're saying is give the veteran the opportunity to take the case out of that other system—and believe me, the perception out there is the system isn't working. And what we heard here yesterday about somewhere between $600 million and $1.46 billion in medical care has got to have some kind of effect on the adjudicatory system, because let's remember, they take the medical records and they take the medical exams, and that's how they make decisions.

So, Mr. Chairman, let me say that PVA support for the enactment of judicial review legislation doesn't come from a belief that the current system is fatally flawed, or inherently insensitive to the needs of veterans. For the most part the VA system works well. But as I say, we've identified problems. And for those who have fallen through the cracks, we think there ought to be another avenue, an opportunity.

And I realize the time is limited here, Mr. Chairman, and I realize, again, we're running late, but I just want to say that we think what you have to be concerned about here—again, I'll go back and say it is the individual veteran. And if even one—it's been said here before—if even one has fallen through the cracks, do we not owe that one something. And what we're hearing is, one here, and one here, and one there, and one over there, and one down the street, and one here, and another one—there's a lot of them out there falling through the cracks, and we think that judicial review is a part of the answer, and we think strengthening the VA adjudicatory system is also part of the answer.

And I will end on that note, and be prepared to answer any questions.

[The prepared statement of Mr. Mansfield appears on p. 312.]

The CHAIRMAN. I think it would be best that we recess for 10 minutes. We have a vote on, and we'll be back in 10 minutes. I encourage the Members to come back as quickly as possible, because I'm afraid after this, we're going to get a vote about every 30 minutes, and if we can keep going, we'll eventually finish up this hearing today.

So we're in recess for 10 minutes.

[Recess.]

The CHAIRMAN. The committee will come to order.

We'll now hear from the VVA. Paul, are you going ahead?

Mr. EGAN. Yes, Mr. Chairman. Our National Vice President, Rick O'Dell, will summarize for us, and since our statement is a collaborative effort, we'll both be prepared to answer your questions.

The CHAIRMAN. Thank you.

Go ahead, Mr. O'Dell.

STATEMENT OF RICK E. O'DELL, VICE PRESIDENT AND CHAIRMAN OF COMMITTEE ON ADVOCACY, VIETNAM VETERANS OF AMERICA

Mr. O'DELL. Mr. Chairman, the Vietnam Veterans of America appreciates the opportunity to present its views on the critically important subject of authorizing judicial review of adverse VA benefit determinations.

We request that the full text of our statement, along with the appendices to our statement, be made a part of the official hearing record.

The CHAIRMAN. Without objection, so ordered.

Mr. O'DELL. In 1986, the last time this issue was reviewed by this committee, the prevailing sentiment was that the VA system of adjudication worked well. For those of us who supported judicial review then, it was argued that nevertheless a judicial review court review was still necessary to assure fairness. Those who opposed judicial review and who ultimately prevailed in defeating the legislation that year, successfully argued that since all agreed that the system was working well, there was no need for further judicial review. In the two years since then, we believe it has been shown conclusively that the system not only works poorly, but that it is systemically antagonistic to the veteran.

On May 26th at a hearing before the Compensation Pension and Insurance Subcommittee, concerning timeliness and quality of regional office adjudications, we demonstrated, among other things, that errors found in VA Central Office quality reviews go uncorrected; VA regional offices with the knowledge of the Central Office are discouraging veterans' request for regional office hearings. There is a general failure to conduct proper and timely hearings for veterans. There is a failure to accord a reasonable doubt in favor of the veteran, and veterans are misled as to the correct deadline for submitting their appeals.

On August the 11th, before the same subcommittee, we demonstrated that the Board of Veterans' Appeals, the VA's Supreme Court of veterans' adjudication is preoccupied with production quotas rather than thoroughness. Among the practices at the

Board that have denied tens of thousands of veterans of fair appellate decisions are production quotas, year-end bonuses for Board members, the Chairman's personal signature list, courtesy signatures being given regularly by Board members on claims decisions without even having ever read the case, manipulation of Board sections by the Board Chairman, and operating an informal production and quality review system in violation of two specific executive exemptions, and Board variances among different Board sections on essentially identical claims.

Mr. Chairman, the evidence is in. The system is broken, and Court review is needed to assure fairness for this Nation's veterans. Apart from this, we have heard that there is a prospective compromise on judicial review that has been discussed, in which a specialty court or Article I Court would be established as a court of last resort in veteran's claims. While the BVA opposes this idea as constituting second class justice for first class citizens, there are several compelling reasons to discard this proposal.

They are: specialty courts require specialty lawyers and are usually more expensive; a single specialty court in Washington, D.C. would require additional travel expenses for veterans; judges on specialty courts tend to have too narrow a focus and tend to micromanage the agency whose claims they oversee; specialty courts lack the prestige required to attract quality judges and practitioners.

In conclusion, Mr. Chairman, of the four bills under consideration today, only two would give the veteran the right to seek court review of their individual cases. Even though the judicial review opponents characterize S. 2292, and H.R. 5039 as judicial review, they are not. Veterans already have judicial review of regulation authorized by each of these bills. Both of the remaining two bills, H.R. 639 and S. 11, give veterans the right to judicial review of individual cases. BVA chooses to champion what is right and fair for veterans. And in choosing from the two, true, judicial review bills, our preference is H.R. 639.

Thank you.

[The prepared statement of Mr. O'Dell appears on p. 333.]

The CHAIRMAN. Thank you very much, Mr. O'Dell.

Dick Johnson, Non Commissioned Officers.

STATEMENT OF RICHARD W. JOHNSON, JR., DIRECTOR OF LEGISLATIVE AFFAIRS, NON COMMISSIONED OFFICERS ASSOCIATION

Mr. JOHNSON. Thank you, Mr. Chairman.

In view of the lateness of the hour and the length of the hearing, I'll try to be very brief in my remarks this afternoon.

The Non Commissioned Officers sits today, as it has in the past, opposed to judicial review of VA benefit and claims decision in District Courts across the United States. We believe that the uniformity of decisions would suffer, and we believe that timely consideration would also be an issue which would do a disservice to veterans.

However, as we have in the past, we do sit here today in support of a court of veterans' appeals. And I would like to take this opportunity to expand on that just a little bit in comparison with the legislation under consideration and with some of the discussion that has gone on today.

The legislation affecting the Board of Veterans' Appeals under consideration would vest the BVA with a review authority that is unequal in government. As a matter of fact, there is not another agency in government whose operations are subject to the kind of review authority proposed for the Board of Veterans' Appeals in legislation under consideration here.

NCOA agrees with the efforts to make the Board of Veterans' Appeals more independent, but does not hold with granting it such additional and unprecedented powers of review over the VA, an action that we believe would be clearly inconsistent with efforts to upgrade the VA to a cabinet agency. We would support retention of the BVA and create an Article I Court, a court of veterans' appeals, which would oversee, or which would have the authority to review BVA decisions. We believe that such a court has precedent in the Court of Military Appeals and the Tax Court. We believe that such a court could focus on the problems of greatest interests to veterans. We believe that such a court would preserve the integrity and uniformity in decisions which veterans have a right to expect and receive.

We further believe that such a court is, in fact, long overdue. This goes back to testimony that we've given before Congress for the past nine years in support of creating a court of veterans' appeals, as opposed to opening judicial review in District Courts.

That, Mr. Chairman, is a general synopsis of NCOA's position on the issue. I'd be more than pleased to address any questions.

[The prepared statement of Mr. Johnson appears on p. 513.]

The CHAIRMAN. Thank you. And I'd certainly like to thank the witnesses for your consideration of the committee and the problems we're having of votes on the floor.

Mr. Evans?

Mr. EVANS. Thank you, Mr. Chairman.

I missed your testimony, Gordon, but I'll review it completely, and I do appreciate your testifying as well. Let me ask you, though, I understand that under S. 11 a veteran resident of Puerto Rico must file his lawsuit against the VA in the U.S. Court of Appeals in Boston, Massachusetts, whereas, under 639 a Puerto Rican veteran can file in the local U.S. District Court. So what would be your concern, or would you have a concern about forcing veterans to file suit thousands of miles from where they live?

Mr. MANSFIELD. I think you raise a good point, sir. What we're talking about here is, in my estimation, is moving into another branch of the Government, and that branch works in its own ways. Maybe that's one we could iron out in conference.

Mr. EVANS. Okay.

Let me ask the VVA about the specialty court issue, the Article I Court issue, if you could maybe further clarify your position on that?

Mr. EGAN. I appreciate your asking that question. The question of an Article I Court has been discussed at some length today, but I think there's some misunderstanding as to what's being discussed here.

Virtually every specialty Article I Court, that I'm aware of, is subject to Article III court review. Now, is it the intention of this committee to establish an Article I Court without Article III review? I don't know the answer to that, but if it is, it would be a mistake. If we're talking about establishing an Article I Court, by creating that court out of the existing Board of Veterans' Appeals, then I think a point that was made by Mr. Rowland earlier, deserves some consideration. He said, that as we look at this issue, we shouldn't be destroying, completely, the existing system. And yet, that's exactly what we would do if we created an Article I Court out of the BVA without any Article III review.

If we were going to do that, then we would certainly expect Article III review by the Federal District Courts on questions of fact using an arbitrary and capricious standard. If we were going to look at a compromise that maintained, or perhaps strengthened the Board of Veterans' Appeals, while simultaneously creating a specialty Article I Court with Article III review of fact at the Federal District Court level, that might be a compromise that we could embrace. But we'd like to be clear as to what the committee's intention is on this very, very important question.

Mr. EVANS. No further questions, Mr. Chairman.

The CHAIRMAN. Mr. Bilirakis?

Mr. BILIRAKIS. Thank you, Mr. Chairman.

Paul, to continue on that, as you put it, very, very important point, if the Article I Court were not the BVA—you said something about the District Court level, and I don't know whether you intended to mean District Court, or whether you intended to mean a level above BVA?

Mr. EGAN. What I meant was, that if we create an Article I Court out of the existing Board of Veterans'—

Mr. BILIRAKIS. If it is not created out of an existing BVA, but you're talking about a review court, if you will, and Mr. Johnson mentioned the Court of Military Appeals, and the Tax Court, and there are others.

Mr. EGAN. Well, the Court of Claims, for example, is reviewable by an Article III court at the Federal Circuit level.

Mr. BILIRAKIS. But it is a specialized court, specialized review court strictly reviewing, you know, those particular issues, those particular matters.

In other words, the Federal District Court, as we know, and Court of Appeals, and whatnot, in general in terms of the issues. But if you're talking about a level above the BVA, retaining the BVA, but a level above BVA, is that something that would be acceptable to you all?

Mr. EGAN. Only if it was subject to Article III court review of fact.

Virtually every other Article I Court is reviewable by an Article III court.

The CHAIRMAN. Will the gentleman yield?

Mr. BILIRAKIS. I would yield to the Chairman, yes, because I think it's a subject we ought to explore.

The CHAIRMAN. The problem is that I think it was very clear in our last panel of witnesses, the DAV and the American Legion, and the VFW, the one thing they don't want is fact review of these cases in the District Court. And the VVA, I assume is the only veterans' organization that seems to be pushing this fact review in the Federal District Courts.

But I think it was loud and clear that if you want to stir up a hornet's nest, you come out with a bill here that has fact review in it, and the bill's not going anywhere.

I appreciate the gentleman yielding.

Mr. EGAN. Mr. Chairman?

Mr. BILIRAKIS. Yes, go ahead. Go ahead, Paul.

Mr. EGAN. I just wonder if the committee would entertain the idea of an Article I Court above and beyond the Board of Veterans' Appeals that was reviewable by the U.S. Circuit Courts of Appeals, on issues of fact?

The CHAIRMAN. Well, I'm sure that we certainly will consider it, and that's why we're having the hearing, to talk these things through.

But you know, we're not going to do anything unless we compromise and I felt like that I've been willing to certainly modify some of my positions, but if the VVA and the PVA and other organizations think they can march in here and get exactly what they want, you can't do it. We're not going to get anything.

Mr. EGAN. Mr. Chairman?

The CHAIRMAN. Yes.

Mr. EGAN. If you'd go along, that would be a genuine compromise from our point of view. We do want to be flexible, and see if there's a possibility of working together.

Mr. BILIRAKIS. I guess I still have the time, but would it really be a compromise if you're talking about a Circuit Court of Appeals still having review ability of this Article I Court? I mean, you're right back to judicial review again, which is within the vein of what VVA, and apparently now PVA, is requesting.

Mr. JOHNSON. Mr. Chairman, if I may, the model that we've suggested seeks to retain the Board of Veterans' Appeals for very good reason. Right now all adjudication is done in the regional offices. The only appeals level beyond that region is the Board of Veterans' Appeals. So if we take away the Board of Veterans' Appeals as we create an Article I Court, then we're automatically sending anything out of a regional office to court, and it doesn't make a whole lot of sense.

So we really need to retain the Board of Veterans' Appeals as it exists. Now, we have suggested the model of the Court of Military Appeals very specifically, because it hears a limited number of cases a year, it hears cases that have already been heard and tried *de novo,* and it also is probably unique in that it is the only Article I Court in the Country where appeals from the Court of Military Appeals go directly to the Supreme Court of the United States without Circuit Court review, without trial *de novo* in a Circuit Court on factual matters, and without trial *de novo* or appellate review in any of the Circuits. And that is why we have chosen the Court of Military Appeals model to make our recommendation.

We believe it would be a very functional way to deal with veterans programs.

Mr. BILIRAKIS. All right.

So now we know what your concept is. Am I to assume that that concept is not agreeable to PVA and VVA?

Mr. **Mansfield**. Contrary to marching in here and demanding things, Mr. Chairman, I think if you look at what the answer was, is what we're trying to do is find out exactly what is being proposed and how does that fit into the concept of judicial review. Because what we're talking about, as I attempted to state in my opening statement, is review of individual veterans' claims. If we're just renaming the Board of Veterans' Appeals, that's one thing. If we're setting up another court then it gets you into the Federal Court System, that's another thing. So I think what we're talking about *here is information*.

Mr. **Bilirakis**. The Federal Court system, Gordon, as envisioned by Mr. Johnson?

Mr. **Mansfield**. One possibility. Like I say, I don't know. When you say an Article I Court, and we read about the BVA being renamed as a super BVA. We're looking for a solution too, Mr. Chairman. We're mandated by a resolution, S. 11 right now, is what meets the resolution as best we can figure out.

The **Chairman**. Would the gentleman yield?

Mr. **Bilirakis**. Yes, I would. I guess my time is up.

The **Chairman**. Well, you stirred up a hornet's nest.

Mr. **Bilirakis**. Thanks a lot.

The **Chairman**. In other words, you're saying, what you're saying, PVA, you can adjust with your positions, I assume that's what you just said, Gordon.

Mr. **Mansfield**. I believe that I'm sent up here with some discretion, and in an attempt to be reasonable, and I think everybody in PVA understands that the legislative process is made up of compromise.

The **Chairman**. I certainly agree.

Mr. **Mansfield**. As long as it meets the basic requirements of what the resolution is, then we'll work with everybody here towards a solution.

What we're looking for is an answer for the people out there that I was talking about that have got problems.

The **Chairman**. That's fair enough.

Mr. Harris?

Mr. **Harris**. Following up with Mr. Johnson, let me see if I understand what you're saying. You're talking about maintaining the Board of Veterans' Appeals, and of course, with the fact as well as law and regulation consideration, then an appeal *de novo* to an Article I type situation where you could have a fact and law and regulation review, then from there an appeal—and we can call it COVA, the Court of Veterans' Appeals, which would just be a review of the record?

Mr. **Johnson**. No, Mr. Harris. You're got one extra step in there.

Mr. **Harris**. All right.

Mr. **Johnson**. No, we would retain the Board of Veterans' Appeals with some reinforcement of it's position, but nevertheless functioning very much as it does now. And then a Court of Veterans' Appeals. That Court of Veterans' Appeals would be it's own judge whether it's trial *de novo*, or whether to review the record.

Mr. **Harris**. Oh, either one?

Mr. JOHNSON. All courts judge the cases they'll take in that manner.

Mr. HARRIS. All right.

And then from there to the Supreme Court?

Mr. JOHNSON. From there to the Supreme Court.

Mr. HARRIS. You would still have your *de novo* hearing in a court outside of the veterans' system?

Mr. JOHNSON. Subject to the discretion of the court, if the court accepted the case.

Mr. HARRIS. Sure, sure.

What about that, Gordon?

Mr. MANSFIELD. My initial thought is I'd rather see it go the way other Article I Courts do, which is to the Circuit Court of Appeals, because there I think you're going to get a better chance of getting something reviewed.

Again, all you've got to do is look down the street, look at the numbers of cases that come in there, and look at the number that are just turned down versus the number that are held. And again, looking at this issue and what you're dealing with in a legal context, I think the Circuit Court of Appeals would be something we'd prefer.

You're just not going to get the review at the Supreme Court level.

Mr. HARRIS. Paul?

Mr. EGAN. That's absolutely right. If you make the Article III review of the Article I Court at the Supreme Court level, you've effectively knocked out any real, practical Article III review.

Mr. HARRIS. Then to do it the way you're talking, would be the four steps that I had outlined to start with, my misunderstanding of what Mr. Johnson was saying. That you would have an Article I type court outside of the BVA, and then from there to an appeals process, and then from there to the Supreme Court.

Mr. EGAN. What we said in our statement is that we support—

Mr. HARRIS. My mind's open on this too. I'm just trying to find out—

Mr. EGAN. We supported H.R. 639. We think the Federal District Court level is the way to go. It may not be that this committee's prepared to do that. What I've said, is that it might be an acceptable compromise if you maintained or strengthened the Board of Veterans' Appeals, as Mr. Johnson has suggested, establish your Article I Court, and have that Article I Court's decisions reviewable in an Article III court on issues of fact using an arbitrary and capricious standard.

Mr. JOHNSON. Mr. Harris, if I may add to that, I think there's a ground at which we could agree, if we limited it to a single circuit. In other words, if you had your review of the Article I appeal, only in the—well, I'm not sure what's the judicial district of Washington—I would hate to see it get into 11 Federal Circuits. But if we had a single Circuit reviewing, then we could still count on a consistency, if you follow what I'm saying, Mr. Harris.

Mr. MANSFIELD. Sir, what I think you're saying seems to be, from what I understand, S. 11 with another one added at the bottom.

Mr. HARRIS. That's all I have.

The CHAIRMAN. Mr. Smith?

Mr. Smith of New Jersey. Thank you, Mr. Chairman, and I want to welcome our panel to the hearing.

Mr. O'Dell, I've taken the time to read your testimony. I've noticed that in talking about the Article I Courts, you list, or cite a study commission by the Administrative Conference which lists the advantages and disadvantages of such a tribunal.

And under the advantages you point out relief for regular courts, certainty in law established more quickly, and significantly better understanding by the judges. Under the disadvantages you cite the quality of judges. And I'd like to focus on that very briefly.

Under the quality of judges, you note that specialty courts are generally regarded by society and the legal profession as less prestigious than generalists courts, and that they're less likely to attract a high quality of judges and practitioners. And yet, this morning Judge Arnold pointed out in his testimony on page 22 that it is his belief that the tribunal would quickly acquire expertise in the subject matter of benefits appeals and should be able to make decisions more quickly on the basis of a better understanding. Your testimony, at first, seems to say in citing that study, a better understanding by the judges, presumably of the facts, and of the law, and that was concurred with by the judge, and yet you raise a very serious issue of there being a lack of quality in the judges that would constitute this particular specialized court.

If you could speak to that and perhaps elaborate on your view as to why these judges would be inadequate to adjudicating these cases and rendering final opinions, I would appreciate it?

Mr. O'Dell. I think as you noticed, our testimony points out both advantages and disadvantages, and certainly one of the inherent advantages of an Article I type court is you can develop expertise on a given specialty of law. That certainly would be true of a specialty court dealing with veterans' law. I think the disadvantages where you see myopic judges with too narrow of focus and the tendency to micromanage the agency, is easily corrected if you subject that Article I Court to Article III court review, to prohibit that from happening.

And that, to a large extent, is the basis for our willingness to compromise in an Article I Court that would provide Article III court review.

Mr. Smith of New Jersey. But on the quality of judges, your final line would be that in most cases they would be acceptable, but there would be that abhorrent judge who may not be living—myopic, as you put it—who might not be living up to his—

Mr. O'Dell. I think you can say that that standard, or that yardstick, applies to the judicial system across the board. And I see no difference with that in Article I. But the check and balance is the appeal system within that judicial system. That's what we seek by Article III review of an Article I Court dealing with veterans' law.

Mr. Egan. I just want to repeat one thing here, and that is just to make sure that it's clearly on the record, that every other Article I Court is subject to Article III court review.

Mr. Smith of New Jersey. Thank you for reminding us.

I asked the previous panel, regarding S. 11 and its standard in findings of material fact that it be done so, or could be set aside only when it's utterly lacking in a rational basis. I have a couple of questions since that bill obviously had the support of at least two organizations as it went through the Senate. Was there any attempt to try to change that? Do you concur with that? Is that what you'd like to see in a final product here?

I know that Mr. Evans' bill does not have that, but how was that able to slip through Mr. Cranston's—escape his notice? It will result in, which I garnered from the previous panel, of very few cases being reversed. And the bottom line is, if there is a real problem with BVA and cases ought to be reversed, and this is going to result in very few, what has really been accomplished in passage of that bill?

Mr. EGAN. First of all, Mr. Smith, we registered our views about that particular standard with the committee at the time they held hearings and subsequently. And the committee didn't go along with our advice as to strengthening that.

I think Senator Specter had an interest in the very same subject. In fact, on the Floor of the Senate during a consideration of S. 11, there was a rather lengthy colloquy between Senator Specter and Senator Cranston attempting to establish, for the record, that it was not the intention of the Senate that no veteran be able to get his claim—get a VA decision overturned in court. So, the fact that that—

Mr. SMITH OF NEW JERSEY. If you'll yield, Mr. Egan, you know, statements of intent, legislative intent are important, but the court looks at the very wording itself and since this is—

Mr. EGAN. As I think you know, there are three standards of review that are basically in practice. The first of those is the substantial evidence standard, and that's the one that applies to Social Security. That's the Cadillac of standards of review. The one that's arbitrary and capricious is the one in H.R. 639, that's a retreat from the substantial evidence standard, and perhaps it's inappropriate to say so, but you might characterize the standard in S. 11, even though we've supported it, as the Yugo of standards.

[Laughter.]

The CHAIRMAN. What the Chair would like to do, we're going to have a vote in about six or seven minutes, and I would like to get these other committee members in to maybe get some comments or questions and then we'll try to get the other two panels after this next vote. Your time has expired, Chris, and Jim Jontz?

Mr. JONTZ. Thank you, Mr. Chairman.

I like this idea of an Article I Court with appeal to an Article III court. But let me see if I understand the situation correctly in terms of your position. It's the concern of VVA and PVA that there be some sort of review by the court system, and you are willing to look at this compromise proposal, because you would anticipate that the bulk of cases coming out of the BVA and going to an Article I Court would be resolved satisfactorily in the Article I Court. However, in a handful of cases, a small number of cases that might not be resolved satisfactorily there would be subject to judicial review, then, if the case were appealable to an Article I Court, and the fact that that appeal did exist would exercise constraints, and would shape the way the Article I Court works so that your basic effect would be satisfied. Is that a fair summary of your position?

Mr. **EGAN**. For those that are concerned about specialization and a need for that, there's something to be said about an Article I Court. But in order to have the best of both worlds, the generalists's view, then you have to have the Article III court.

Mr. **JONTZ**. Thank you.

Mr. **MANSFIELD**. Another way to look at it, sir, is this. If you just take an Article I Court you might as well just be talking about renaming the BVA and you've got the same thing you've got right now, except with a different name. The whole idea of getting the other branch involved is because what it does to the system. And as you say, you're coming from the bottom up. And if you look at it the other way, having that appellate review staring them in the face means that they're going to act in such a way that they'll stay away from it as much as possible.

Mr. **EGAN**. Mr. Edwards, I think, put it about as succinctly this morning as anybody could. He said, you have to watch out for specialty courts because sometime they become sweetheart courts. And without that review beyond the specialty court it may be very risky.

Mr. **JONTZ**. Well, I wish I had the spokesman from the previous panel here to ask the question to them, and Mr. Johnson, I know you cannot speak for them, but you're organization has taken a little bit different position than the other two.

I guess then what I would like to hear an answer to, it would be helpful to know whether this sort of compromise proposal would meet with favor from the individuals who have opposed Congressman Evans' bill from the standpoint that the bulk of cases would be handled through a specialty court, that you would expect the specialty court to deal with them in a satisfactory manner, and that the problems associated with judicial review, as seen by the Legion and VFW, and other organizations who have opposed the Evans' bill, would be mitigated substantially by the fact that there's an Article I Court there to handle the bulk of the cases. And it just seems to me that that compromise or that proposal does satisfy the main concerns of the groups on both sides.

And I don't know, I guess you have said as much, although your preference is, Mr. Johnson, to have an appeal to the Supreme Court only—

Mr. **JOHNSON**. That would be our first preference. I acquiesced here a minute ago. I obviously cannot speak for the other organizations.

Mr. **JONTZ**. I understand.

Mr. **JOHNSON**. I do speak only for NCOA. Again, I think if we had appeal from the Article I Court to Appeals Court in a single circuit, where once again we would have the focus narrowed somewhat, so that we didn't have—so that we had something binding across the Nation, as uniformed decision coming out of a single circuit, then we could buy a single circuit court review and the Article III court review prior to Supreme Court consideration.

Mr. **JONTZ**. Thank you.

The **CHAIRMAN**. It looks like we're all coming aboard. Other than fact review as you said, there doesn't seem to be that much disagreement. It seems that would be 90 or 95 percent of what the

PVA and what VVA would want, the Article I Court, with review by the Article III court.

Let me get Marcy Kaptur here.

Ms. KAPTUR. You really want the waters muddied here, Mr. Chairman, I take it.

The CHAIRMAN. Well, we're coming together, maybe you ought to muddy it so we won't get together here.

Ms. KAPTUR. I want to thank you, because I've told the veterans' organizations in my district if the veterans' organizations can't agree on a proposal, I'll vote against. So I'm anxious to see some type of compromise, and I'm still undecided and listening, and have learned a lot today.

I, at the same time, am trying to weigh the interests of justice to individual veterans who may not be served by the system, and my own growing aversion to attorneys, and to long court cases, and toward greater costs, and toward delay. And I have to tell you, it's a very strong aversion. So, I'm trying to be fair here in my own votes on the committee, and it has been troubling to me as to why the veterans' organizations have not been able to get together on this.

I was very taken this morning with the testimony from the first panel, where they talked about the establishment of a uniform policy of judicial review for all administrative actions dealing with government benefits. And though we sit here on the Veterans' Committee, we have the good fortune of having Don Edwards on this committee as well. I know from my district office, and we rechecked again before this hearing today, the most frustrating group of cases we deal with are the Social Security cases and the BVA cases. Those things drag on for months, for years, and frankly, I don't think they are fair. If they're meant to be fair to the constituent, they drag on forever, they cause us all kinds of delays in our office. I don't think the present system functions to the benefit of justice for people who receive government benefits, or may not receive them, and want review.

I am taken with the idea of an Article I proposal, but I am not so sure I would vote for it if all it applied to were veterans benefits, because, frankly, I'm looking beyond that to the rest of the caseload that we deal with as members. And I'm sure if you check your district offices, you'll find that the Social Security cases stay on the computer for years and years. I would hope that we might be able to draw on the good intelligence of the Chairman, Mr. Edwards, and see if we can't do something to improve the whole system.

I really do think you almost need a specialty court, because we have to hire experts to deal with seven levels of appeal for Social Security. There may be some fairness involved in that. But, a lot of the constituents are dead before the judgment comes down.

I have an interest in some type of compromise position that would move us in that direction, but I wouldn't want it exclusively toward veterans. At least, that's what I'm thinking right now.

Also, I have a question on the location. I mean, where do veterans have to go? Assuming this would be set up, or for Social Security recipients, or for railroad retirees, or black lung cases, where do claimants go? Do they have to travel to Washington? Where is this court located? I have a question on that, and I don't know the answer to it, but there's cost involved there that I think we ought to think about.

So, I just wanted to put my own personal feelings on the table at this point, Mr. Chairman, and say I hope we can reach some resolution, and thank you for the time.

The CHAIRMAN. Thank you very much.

Tom Ridge?

Mr. RIDGE. I'll just ask you, in the system as it exists today, do veterans' organizations in and of themselves have a legal way to challenge regulations that you think are unfair or improper?

Do you have standing in the system today, without a claimant, to challenge a regulation?

Mr. EGAN. I would simply state that it's our view on questions of regulation that the Supreme Court decision in the *McCalvin* and *Trainor* cases held that the VA's regulation holding alcoholism as willful misconduct, held that that regulation was not a violation of the Rehab Act of 1974. But the question before the court was whether or not the regulation was a violation. That question wouldn't be before that Court if we didn't already have that kind of review.

Mr. MANSFIELD. I think there's a continuation there. And I think the answer basically is, yes, you go to the Committee Report on S. 11, and a recent Supreme Court decision in the New York Club case, as an organization we do have standing on behalf of our membership in general to bring a suit on their behalf.

Mr. JOHNSON. Mr. Ridge, I don't want to steal Mr. Ivers' thunder, because I know he's going to testify later. I think the real answer to that question depends on which judicial district your case first comes up in, because there is a variation in precedent among judicial districts in this country as to whether they will hear cases on VA rules and regulations.

Mr. RIDGE. I guess the question—one of the reasons I asked that is in the Compensation Subcommittee record, they showed the first three quarters of fiscal year 1988 BVA appeals. And there were about 31,000 decisions, and about less than 100 letters of reconsideration, which means that most of the VSO's took a look at the claimant, the facts, the regs, and the laws, and said, for whatever reason, for the time being, we're not even going to ask for this to be reconsidered. We either need new medical evidence, or the regulation is written in such a way that even if we take it up we can't win. Obviously there were almost 30,000—not 30,000 decisions, but in excess of 20,000 denials during that period of time and the service organizations chose not to challenge either the facts or the regs.

But there were almost 100 cases where they decided to ask for reconsideration. And one of the concerns I've had as a member in trying to resolve in my own mind judicial review, since I work on a lot of these cases myself, is I've felt that unless some of these regs were changed, no matter whether or not you had judicial review or not, the claimant isn't going to win. And I'm just wondering how anxious you are to ensure that you have, as a service organization yourselves, the opportunity to challenge those regs. You seem to be content with the opportunity in the system as it exists now. Is that a fair statement?

Mr. O'Dell. Mr. Ridge, I can speak for VVA. We've had no problems in the past in litigating on rules or regulations in regard to the VA.

The Chairman. We've going to have a hard time making this vote, and it's very important.

Mr. Ridge. That's all. Your answers were good, and I appreciate it, Mr. Chairman. Bye.

The Chairman. We want to thank the panel, and appreciate your being here. You're excused and we'll have Mr. Bennett and Mr. Cooper come to the witness stand. We'll be back in 10 minutes.

[Recess.]

The Chairman. The Committee will come to order.

We'd like to hear from Mr. William Bennett of the National Vietnam Veterans Coalition, and also to speak in his own behalf, Mr. Sydney Cooper, of the Veterans Due Process.

You gentlemen are recognized. Your full statements will be put in the record, and the Chair recognizes Mr. Bennett.

STATEMENT OF WILLIAM BENNETT, NATIONAL VIETNAM VETERANS COALITION

Mr. Bennett. Thank you, Mr. Chairman.

We appreciate the opportunity to be able to come before this committee and testify. Our coalition is a federation of roughly 45 membership and veterans' issue organizations, organized around eight points.

One of those eight points was support for judicial review of VA benefits decisions. I think that position comes straight off the recognition that our system has placed a great value on both legal due process and the right to counsel, and veterans shouldn't really be treated much differently than just about anybody else.

I think one of the things I'd like to address immediately: There's been a lot said today about overcrowding the courts. Now, I look at this more as a practicing lawyer, and if you look at the fee structure envisioned in the H.R. 639, it becomes pretty obvious that the $500 fee will not be enough incentive to lawyers and therefore, it's the 25 percent contingency fee that would be the incentive for a lawyer to take a case. That, in turn, means that the attorney doesn't get paid unless he wins, which means he's going to be pretty selective about what kind of case he takes.

And if, taking the Veterans' Administration at face value, they are doing a good job, then there aren't that many cases out there that are going to be taken, as a practical matter, to the Federal Courts. Conversely, if there are cases taken to a great degree, I would submit that would be more of an indictment of the Veterans' Administration for having mishandled so many cases in the first place. Then we would have bigger problems than worrying about overcrowding of the courts.

A second point is, based on this colloquy we've heard in the last few minutes, I think we could support the idea of making BVA into an Article I Court, and then providing one additional layer of Federal Court review, so that you would have generalists reviewing specialists' decisions. I would hope that this Article I Court would have to do a bit of traveling around the Country, so the burden wouldn't be put upon the veteran to have to spend the money to come to Washington to have his case heard.

Going back to the overcrowding, we have done a bit of checking, doing a lot of calling over at the Military Corrections Boards, Discharge Review Board, and the Military Disability system itself, all of which are subject to judicial review. We've put a lot of statistics into our testimony to show very minimal impact when judicial review is available for these cases to be taken into Federal Court.

And since it's late in the day, I think I'll be happy to rest at this point.

[The prepared statement of Mr. Bennett appears on p. 408.]

The CHAIRMAN. Thank you, Mr. Bennett for your consideration of the committee. And you covered some valid points.

The Chair recognizes Mr. Cooper, I believe who is a friend of Mr. Don Edwards, who requested that you testify here today, Mr. Cooper. The Chair recognizes you.

STATEMENT OF SIDNEY COOPER, NATIONAL LEGISLATIVE DIRECTOR, VETERANS DUE PROCESS

Mr. COOPER. Thank you very much, Mr. Chairman.

Veterans Due Process, on behalf of millions of American veterans, wishes to express its strong disapproval of this plague-take-it non-adversarial system of injustice, which has caused veterans so much hardship, degradation, homelessness, and despair. Stonewalling, red herrings, and smokescreens no longer will suffice to keep the "awful truth" from the American people.

This plague-take-it system of injustice denies veterans rights which are accorded traitors, spies, criminals and perverts, such as the right to attorney, and a day in court. Consequently, veterans' interests are routinely trampled by bureaucrats, exercising unbridled power, whose treatment of veterans has become the shame of a nation, and a national disgrace. Bureaucrats with competing interests, primarily their own, involving budgetary considerations, empire building, promotion, monetary awards, and undisclosed interests harboring secret agendas, have supplanted fairness and justice at the VA.

This committee is considering remedial legislation for the fifth time, after being overwhelmingly passed by the Senate five times; four times unanimously. Each time this committee failed to report a veterans' civil rights bill out to the floor under one pretense or another. This committee should understand that unless it acts convincingly and with dispatch, that it may well become irrelevant on the issue of judicial review. Time and tide waits for no man or committee.

On July 25th, 1988, the Seventh Circuit Court of Appeals (en banc) spoke clearly in *Marozsan* v. *The United States,* saying that if, the VA abuses claimed by Marozsan, could be proven, that 211(a) was unconstitutional. If Marozsan can't convince the court, a case filed in New York City last week, September 1st, can and will demonstrate 27 unfair VA practices which deny veterans a fair and impartial hearing. Such practices violate the First and Fifth Amendments to include the equal protection clause.

Both cases are Veterans Due Process sponsored, and are the first of many more legal actions to come. These efforts will continue until veterans are restored to first class citizenship, and the blessings of liberty they fought to preserve for everyone else at great personal sacrifice, only to be denied it themselves.

At oral argument in Marozsan, the VA asserted that even if veterans' claims were denied solely on account of race, color and gender, that the court lacked jurisdiction. In effect, telling the court that it was none of its business no matter how many, or what constitutional offenses were committed in the name of 211(a). Is that what Congress intended?

The breadth of Marozsan, and the contempt shown by the Circuit Court judges when expressing their opinions is clearly evidenced by the following excerpts: (1) "It is axiomatic" that Congress may not act unconstitutionally, nor may it delegate authority to Executive agencies to do so." (2) "Courts must be equally reluctant to license free-wheeling agencies to mete out their own brand of justice." (3) "An alleged arbitrary quota system that obviates the Administrator's need to consider the evidence, is no mere detail, but a serious question of constitutional dimension." (4) "A statute which precludes review of such obviously unconstitutional decisions must be just as unconstitutional as the underlying action of the VA Administrator." (This refers to the VA's assertion that the courts lack jurisdiction to review claims, denied solely on account of race, color and gender.)

Other relevant circuit court quotes may be found in our written testimony.

Many VA decisions defy imagination. These aren't mistakes, but a conscious, systematic effort by the agency to grind veterans down, so that perfectly valid claims are abandoned in utter frustration, confusion, and despair—overcome, by a deep sense of betrayal..

When everything else fails, the VA resorts to these tactics:

(1) Deny the evidence, no matter how many times it appears in the files. Recently, despite the fact that evidence crucial to a veteran's claim appeared 12 times in the Army Service Records, the VA pretends that it doesn't exist, not once, but many times. This evidence is here with me today, if anybody is interested.

(2) Assert the veteran has a prior service injury. Never mind the facts. School records, family physicians, pre-induction physicals, which clearly show no prior service injury are routinely ignored. When the VA is asked to support its contention of prior service injury, none is forthcoming. Nor, under this plague-take-it, devil-keep-it system of injustice, do they have to present any proof. Some veterans have been wandering the corridors of time for over 40 years and still can't find out why their claims were denied.

(3) Fabricate medical theories out of whole cloth. Never mind what the medical experts, or books or articles say. Our general practitioners know better. They must know better or find a job elsewhere.

(4) Falsify the rating data or evaluation, use the wrong rating code, the one which will impoverish a veteran the most. Better still, downgrade the injury. What do veterans know about our

rating codes? After all, the DAV, VFW, American Legion service officers; will go along. They always have.

What should Congress say to these reprehensible practices? Is that what Congress intended? More importantly, what is Congress going to do about it? Congress spawned this bureaucratic monster. Now it is up to Congress to bring it to heel and quick before it consumes us all.

None of this would have surprised Senator Huey Long of Louisiana who, in 1933, when these infamous laws were passed, said, "How long are we going to sit here and see people turned out of hospitals and starved to death by these little 2 X 4 bureaucrats exercising more power than the 96 Members of the United States Senate?

"Instead of being men, standing up on two legs and two feet and running this Government for the people of the United States, we are authorizing some bureaucrat to prescribe limits and rules under which he will work, and then permit him to go off and do what he pleases. That is the trouble with the whole plague-take-it system, and that is the reason why veterans are in the fix they find themselves today."

What should this committee think about the American Legion, DAV, and VFW leadership which routinely tells Congress that our members are happy to be second class citizens and denied legal rights which are accorded traitors, spies, criminals and perverts?

What should the American people say about a 55-year-old conspiracy engaged in by the American Legion, DAV and VFW, of hoodwinking American youngsters into our Armed Forces and then, if injured, strip them of their constitutional rights, consigning them to a lifetime of degradation, despair, and homelessness?

What should the American people think about a leadership which sold its members out on a cross of free services, and then proceeded to lie about it?

The Chairman. Mr. Cooper?

Mr. Cooper. Yes, sir?

The Chairman. The Chair has been very lenient.

Mr. Cooper. I know you have. May I sum up, please?

The Chairman. I'll respect that. Why don't you go about another minute, and see if you can—

Mr. Cooper. Well, I'll sum up, that'll take about a minute.

The Chairman. You've had more time than any other witnesses—

Mr. Cooper. Congressman, I have to tell you, we have timed everybody here and the first witnesses got 10 and a half minutes. That's the truth.

In any event, I'm satisfied to make this last minute remark.

In conclusion, Veterans Due Process submits that Congress must consider truth in recruiting, just as there's truth in lending or advertising; a fair and impartial forum to adjudicate veterans' claims; elimination of the blackmail and intimidation clause; veterans' publications must be open to opposing views; the Financial Secrecy Act must be repealed; attorneys must be permitted access to the VA adjudication system; VA rules, regulations, and operating practices must be subject to the Administrative Procedures Act; *de novo* review at U.S. District Court level must be allowed, there being no satisfactory alternative; grassroots organizations, such as Veterans Due Process, must be afforded the opportunity to speak by matter of right, not sufferance, at Congressional hearings.

Congress and the American people should be reminded of what the father of our Country, George Washington, said: "how the war veteran is perceived to be treated will directly affect the willingness of future generations to make those same sacrifices."

Surely, the right to a day in court is not too much to ask from the American people and its Congress. The conscience of a Nation demands it.

Thank you.

[The prepared statement of Mr. Cooper appears on p. 412.]

The CHAIRMAN. Thank you, Mr. Cooper, for that very strong statement.

I only have one question, and that's to you, Mr. Bennett. I want to thank you also for being here today, and you mentioned about Article I Court—you heard this discussion here earlier by the different veterans' organizations, you might, for the record, tell us your feelings in that area.

Mr. BENNETT. Yes, sir.

I think I indicated that we could see supporting an Article—

The CHAIRMAN. Talk a little more into the mike, please.

Mr. BENNETT. Upgrading BVA into an Article I Court, and then providing for review into Federal Court.

The CHAIRMAN. Into the Circuit Court, the Federal Circuit Court?

Mr. BENNETT. I prefer District Court, but I could live with Circuit Court.

The CHAIRMAN. Okay.

What about fact review?

Mr. BENNETT. Yes sir, fact review.

The CHAIRMAN. Into which court?

Mr. BENNETT. I think it would be probably more appropriate to go into District Court than Circuit Court, but I think the Circuit could review the Article I Court's findings using an arbitrary and capricious standard. The perspective we're coming from, is: The VA adjudicators are going to be human beings, and like all of us, sometimes they're not going to do the best job; that's no different from any of the rest of us, and some cases are going to slip by. You need an additional backstop to try to catch as much of that as you can.

And certainly, with an Article I Court, you're going to have an outlook, a perspective, a specialization that will preclude catching some of that. We don't have to talk about VA here, we could be talking about the Interstate Commerce Commission, or the Office of Surface Mining and Reclamation in Washington, or any number of other agencies.

The CHAIRMAN. Thank you.

Lane Evans.

Mr. EVANS. Mr. Chairman, I don't really have any questions. I just want to thank both Mr. Cooper and Mr. Bennett for testifying to emphasize that, of course, Mr. Bennett represents an association of 45 Vietnam era veterans' organizations and veterans' issues organizations across the Country, certainly a formidable organization, and that Mr. Cooper, of course, does have Vietnam veterans, but many other veterans that work with his organization and appreciate Veterans Due Process advocacy as well and other ongoing interests in judicial review.

Thank you.

The **Chairman**. Thank you.

Claude Harris?

Mr. **Harris**. No questions.

The **Chairman**. Jim Jontz?

Mr. **Jontz**. Thank you, Mr. Chairman.

Mr. Bennett, you made reference in your testimony to the fact that there is now judicial review of decisions from the Military Record Correction Boards. And in your written testimony you present some figures, and if my math is correct, the table that you have presented on page 4 of your testimony indicates that of the initial number of petitions to the Air Force, approximately 1 percent of them end up being reviewed by the Courts. With the Army, based on these figures, it's about ⅒ of 1 percent. I don't know the reason for that discrepancy, but that seems to be the range in there, actually fewer than that for the Navy and Marines.

Are those court reviews? What court conducts those reviews? Can you tell me that?

Mr. **Bennett**. That I don't really have the answer to. I think they go into the District Court, but I'm not sure, sir.

These are also, incidently, estimates that have been put together by various people, and they may not be accurate. I think in the Air Force, it may actually be less than 50, but nobody's really sure over there.

Mr. **Jontz**. Well, that gives us some sort of a range, or some sort of a ball park estimate.

Mr. **Bennett**. Yes, sir.

Mr. **Jontz**. And are those court reviews, reviews where a determination of fact is a part of the review, or not?

Mr. **Bennett**. As far as I know it would be an arbitrary and capricious standard.

Mr. **Jontz**. Okay.

And you see no—it would not be your opinion—I see anywhere from 25 to 60 percent of the petitions which initially go to the Military Records Correction Boards are approved.

Mr. **Bennett**. In part or in whole, yes, sir.

Mr. **Jontz**. Now, it would not be your impression—one of the fears that's been expressed about this idea that we have an Article I Court, make the BVA into an Article I Court, and then allow for Article III court review, one of the fears that's been expressed about that is that every adverse determination from an Article I Court would be appealed to an Article III court. That certainly is not the case with the Military Records Correction Boards.

In other words, they're obviously very, very large numbers of adverse determination that are not appealed.

Mr. **Bennett**. Correct, sir. And I think also it would heighten the fact that you would not have any kind of fee limitation on the attorneys in the Military Correction type situation, whereas you would have a fee limitation in the BVA context which would basically eliminate any case that didn't look like a very strong case for the attorney trying to take the case into court.

Mr. **Jontz**. So, given the lack of fee limitations with appeals to the Military Records Corrections Board, and given the scope of the appeal that's allowable, do you think this experience we have with the Military Records Correction Board would be an accurate guide to the number of appeals that you would have, or if anything, might even overstate the number of appeals if we took this as a guide, or for the number of cases that might be appealed for VA decisions from an Article I Court to an Article III court?

Mr. **Bennett**. I would certainly hope so. I think it's all speculation, regardless of who puts the numbers together.

Mr. **Jontz**. Well, I know that you can't provide it. It certainly would be helpful to have some evidence with regard to other types of Article I Courts, courts, or what-have-you, about how many cases get appealed from those courts to in whatever sort of Article III court review that there is, and I know that you can't provide that, but it would seem to me that we could look at those existing cases where there is review, judicial review, to get some sense of what sort of a proportion of case would be reviewed.

Thank you for your testimony.

The **Chairman**. We'd like to thank our two witnesses for being here, and being so patient. And we'd like to invite you to stay around for our last witness, and Mr. Donald Ivers, the General Counsel, Veterans Administration, along with Jack Thompson, Assistant General Counsel.

I'd like to have him—and Don, you've been here before—

Mr. **Ivers**. I was here yesterday, Mr. Chairman.

The **Chairman**. That's right. You've been here for two days now. And we would hope that we could get your testimony. We're going to have a vote in about 10 minutes or less. Have you been eating up here, you've been here for two days?

Mr. **Ivers**. I kind of feel like I have, sir. It's kind of like home.

The **Chairman**. I feel sorry for you if this is like home.

STATEMENT OF DONALD L. IVERS, GENERAL COUNSEL, VETERANS ADMINISTRATION

Mr. **Ivers**. Mr. Chairman, I can keep my remarks very brief.

I would, first of all, like to thank you and the members of the committee for this opportunity to testify. At this hour of the day and given the testimony that's preceded me, there's not much left to be said. There are a couple of things that I think we, or I as a representative of the Veterans Administration should say.

We've been through the testimony here, and we've been through it a number of times. We've heard a lot of the same cliches, a lot of the same anecdotal evidence of things wrong with the system. What's refreshing about the testimony in this hearing is that there are now a number of approaches to the problem. We're not stuck with one form of legislation or another. And we find that refreshing.

Now, having said that I will reiterate that the VA does continue to strongly oppose the concept of judicial review, particularly judicial review of fact based individual benefit decisions in the courts. We feel, as we have all along, that that type of review will inure to the detriment of the vast majority of veterans who utilize the system and are satisfied with the result, and inure to the benefit of a very few, if any, who once having been through the entire process, choose to take a case to court, and endure the expense and time involved in doing so. After it has been thoroughly reviewed by the VA, including the Board of Veterans' Appeals, and multiple opportunities to reopen that case have been granted, they will find that the courts are not too likely to make a different decision.

I'll discuss a couple of other brief points and then I'll be glad to answer any questions that you may have. First of all, I would like an opportunity for Mr. Eaton, and for my office to review the burn case that Congressman Evans referred to earlier. If it is as represented, then it certainly should be reviewed.

Another point that I would like to make here, is we've talked long and hard about judicial review and the benefits that would befall veterans who have an opportunity to take their cases into court, and we've heard both sides of this issue. One of the things that I don't believe has been pointed out, is that the reversal rate in the United States Courts of Appeals is 13½ percent. The BVA allowance rate is somewhere between 14 and 15 percent, and the allowance rate overall in the VA/BVA appellate process is about 21½ percent. I just state those figures for the record as something to consider as we think about whether what we're going to do here as a result of these hearings is going to really benefit veterans in the long run, or change the system as it currently exists, or change the results as they currently exist.

With that, Mr. Chairman, I think I'll close my remarks. I notice I have a little time left and just state that I'm prepared to try and answer any questions you may have.

[The prepared statement of Mr. Ivers appears on p. 446.]

The **Chairman**. Thank you, Don. And that was excellent testimony, and I appreciate your patience.

The Chair doesn't have any questions.

Lane Evans?

Mr. **Evans**. Thank you, Mr. Chairman.

I'd like to focus on the June 9th testimony before the Senate Veterans Affairs Committee by Mr. Eaton, in which I understand he stated the number of cases to be heard before traveling boards are allocated to veteran service organizations. Now, isn't it true that travel boards have a much higher allowance rate than personal hearings on boards based in Washington, D.C.?

Mr. **Ivers**. Mr. Eaton is present in the room, and I'm sure he could respond to that better than I could, if you'd like that.

Mr. **Evans**. That would be fine with me, if he'd like to come forward.

Mr. **Eaton**. Good afternoon.

The **Chairman**. You might identify yourself, sir.

Mr. **Eaton**. Kenneth Eaton, Chairman, Board of Veterans' Appeals.

There are allocations made, not by the Board of Veterans' Appeals, but at the regional office; they will allot so many cases. It will vary a little bit from regional office to regional office, but there is some sort of allocation process there. There is only time for so many hearings at a regional office.

Mr. Evans. These are allocated to the veteran service organizations?

Mr. Eaton. Well, not always. I can recall any number of times where an individual who has no representation at all has been allotted a spot on that travel board hearing schedule.

Mr. Evans. Well, before the Senate Veteran Affairs Committee you testified as a reason for not offering veterans the option of a personal hearing before a travel board, on form 1-9, known as the substantive appeal, that this would encourage too many personal hearings. How do we divvy these up?

Mr. Eaton. I don't really have an answer. Of course, you understand, they get their personal hearing before the regional office personnel. They may not get a personal hearing before the Board of Veterans' Appeals itself unless they come to Washington. Because of the limited number of travel boards, we would have to have—well, my estimate would be four to five hundred percent increase, at least, in the travel board arrangements—

Mr. Evans. To hear everybody.

Mr. Eaton. Yes, at least.

Mr. Evans. How do we—who's that lucky veteran who gets the right to go—wait a minute, let me go back, let me retract that question, first.

Is it true that travel boards do have a much higher rate of allowances in personal hearings?

Mr. Eaton. Yes, they do.

Mr. Evans. Now, how do we, in terms of holding out a system of equal justice to people, not, one, tell people that this is generally a right that everyone should be aware of, and then, two, since we don't tell the vast majority of veterans, or any kind of disclosure on the form, about that potential option, who is in charge of divvying that up? I just don't understand how perhaps a veteran who's politically unconnected, perhaps, from my district, doesn't even think of calling their Congressman, despite the fact that I've tried to work hard on this committee, how do we make him aware? And wouldn't that create two systems of justice?

Mr. Eaton. I understand your concern.

Let me first explain, if we had an arrangement so that they all could have these hearings, the allowance rate would be the same as all the other allowances. You understand that.

(Subsequently, the Veterans Administration submitted the following information:)

With regard to notifying claimants of their right to request a hearing before a traveling section of the Board, Rule 60 of the Board's rules of procedure provides that hearings may be held before a traveling section of the Board to the extent that scheduling permits. The Board's rule is promulgated at 38 C.F.R. § 19.160(b). It has the effect of law and claimants are charged with knowledge of the law. Moreover, accredited representatives of the veterans service organizations and VA's own benefits counselors are familiar with the practices of the traveling sections of the Board and apprise claimants of their rights.

As a practical matter, the use of traveling sections of the Board is an expensive proposition, and the Board makes available its personnel for this procedure to the extent its budget allows. However, access to traveling sections of the Board is not denied any claimant for budgetary reasons. Should a claimant request a hearing before a traveling section of the Board when the traveling section is not available, the claimant is advised that his or her request will be honored when the traveling section next returns to the regional office. Of course, the claimant is also apprised of the other more immediate options: a hearing before the Board in WAshington, D.C., or before appropriate personnel in the regional office acting as agents for the Board.

Mr. EVANS. Well, that may be true, but how do we still—I mean, that still if the rate of allowances are higher for the traveling boards, how do I tell my veteran out there who didn't know about it, that this is an equal system of justice when he doesn't have the fundamental notice. I mean, that is an essential part of any system of law that people have, at least the knowledge of what options they have. I understand your funding, but I mean—that's another thing, I mean, we keep hearing about veterans who can't get justice, or can't get traveling boards because of funding.

Well, I understand that that may be extremely—funding for the traveling boards is what I'm referring to—that may be a problem, we do have cost problems within the VA, but it's a little hard for me to tell a veteran, that, hey, you didn't know, you didn't have an attorney, or you weren't connected to a veterans' service organization, therefore, you don't get the availability of a traveling board. And perhaps, at least a higher chance of recovering the benefits that you claim.

Mr. EATON. Well, the only answer I can give is that if, as I said before, if there were enough personnel to full staff the potential for travel board, that allowance rate would come down to the normal, because the service organizations would not be saving only the best cases for personal hearings, and then that would affect the allowance rate.

Mr. EVANS. Well, that might effect the allowance. It just seems to me to be an unfair form of justice.

I know we have to—I still have some time, Mr. Chairman—I still have some questions, but if we have to break, I can wait.

The CHAIRMAN. I appreciate the gentleman's cooperation—questions will be submitted, and we'll ask the witnesses to answer in writing.

Mr. EVANS. I may have some others. I can maybe come back and wait the entire round, but I had one minute left I think. But I'd rather come back and wait for my colleagues to perhaps go through.

The CHAIRMAN. Okay.

Any other questions from any other members?

[No response.]

Mr. EVANS. Can I maybe conclude?

The CHAIRMAN. Maybe one more minute and then maybe we could wrap it up. It would help the Chair.

Mr. EVANS. That would be fine, Mr. Chairman. If I can just collect my thoughts for a second.

Well, let me just ask you, then, how many veterans—or if you don't have it—how many veterans unrepresented by veterans' service organizations get personal hearings before a traveling board, in the last two years, let's say?

Mr. EATON. I'd have to provide that for the record. I'm sure it's not very many. But I'd have to provide that.

Mr. EVANS. Well, I would appreciate that.

And do you have any plans to change this, at least, to at least allow people to know the—to at least have the option of at least asking for it, even if we don't have the resources?

Mr. EATON. You understand that if we give them the opportunity to ask for it, there would be some 11—there are approximately 11 to 12 thousand personal hearings in the field, and if they all asked for a travel board hearing, that would have considerable impact.

Mr. EVANS. You're right, because I would too.

Mr. EATON. Yes.

Mr. EVANS. Let me ask you then, I'd like the statistics, and I'd also like, unless you submitted this to me in response to the previous hearing that we had, and we dealt with this issue, the breakdown, in let's say the last two years, of which major veterans' organizations got how many across the Country, and also how many unrepresented veterans, meaning those not represented by a—

Mr. EATON. We'll provide that for the record. That is done at the local level, you understand, but nevertheless, it's got to come some sort of a breakdown there.

(The information requested appears on p. 459.)

Mr. EVANS. All right.

Mr. Chairman, thank you, and Mr. Chairman, thank you.

The CHAIRMAN. Thank you.

If there are no further questions, we want to thank our two witnesses today. I want to thank all the witnesses, and thank the audience for their patience, and the Chair now declares this committee adjourned, and there will be a markup on this legislation on September the 15th.

[Whereupon, at 3:46 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

100TH CONGRESS
1ST SESSION

H. R. 639

To amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 21, 1987

Mr. EVANS (for himself, Mr. EDWARDS of California, Mr. LAFALCE, Mr. BONIOR of Michigan, Mr. STAGGERS, Mr. FLORIO, and Mr. KANJORSKI) introduced the following bill; which was referred to the Committee on Veterans' Affairs

A BILL

To amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) this Act may be cited as the "Veterans' Administration Adjudication Procedure and Judicial Review Act".

(b) Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code.

TITLE I—ADJUDICATION PROCEDURES

SEC. 101. (a) Chapter 51 is amended by adding at the end of subchapter I the following new section:

"§ 3007. Burden of proof; benefit of the doubt

"(a) Except when otherwise provided by the Administrator in accordance with the provisions of this title, a claimant for benefits under laws administered by the Veterans' Administration shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Administrator shall assist a claimant in developing the facts pertinent to the claimant's claim.

"(b) When, after consideration of all evidence and material of record in any proceeding before the Veterans' Administration on a claim for any benefit under laws administered by the Veterans' Administration, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of such claim, the benefit of the doubt in resolving each such issue will be given to the claimant, but nothing in this section shall be construed as shifting from a claimant to the Administrator the burden described in subsection (a) of this section.".

(b)(1) The table of chapters at the beginning of title 38, United States Code, and the table of chapters at the beginning of part IV of such title are each amended by striking out "Applications" in the item relating to chapter 51 and inserting in lieu thereof "Claims,".

(2) The heading of such chapter is amended to read as follows:

"CHAPTER 51—CLAIMS, EFFECTIVE DATES, AND PAYMENTS".

(c)(1) The table of sections at the beginning of such chapter is amended by striking out "applications" in the item relating to subchapter I and inserting in lieu thereof "claims".

(2) The heading of subchapter I of such chapter is amended to read as follows:

"SUBCHAPTER I—CLAIMS".

(d) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 3006 the following new item:

"3007. Burden of proof, benefit of the doubt.".

SEC. 102. Section 3311 is amended by adding at the end the following new sentences: "Subpenas authorized under this section shall be served by any individual authorized by the administrator by (1) delivering a copy thereof to the individual named therein, or (2) mailing by registered or certified mail addressed to such individual at such individual's last dwelling place or principal place of business. A verified return by the individual so serving the subpenas setting forth the manner of service, or, in the case of service by registered or certified mail, the return post office receipt thereof signed by the individual so served shall be proof of service.".

SEC. 103. Section 4001 is amended—

(1) in subsection (a), by inserting "in a timely manner" before the period at the end of the second sentence; and

(2) by adding at the end the following new subsection:

"(c) The Chairman shall submit a report to the appropriate committees of the Congress, not later than January 1, 1987, and annually thereafter, on the experience of the Board during the prior fiscal year together with projections for the fiscal year in which the report is submitted and the subsequent fiscal year. Such report shall contain, as a minimum, the number of cases appealed to the Board during the prior fiscal year, the number of cases pending before the

Board at the beginning and end of such fiscal year, the number of such cases which were filed during each of the twenty-four months preceding the prior fiscal year and the then current fiscal year, respectively, the average length of time as case was before the Board between the time of filing of an appeal and the disposition during the prior fiscal year, and the number of members and other professional, administrative, clerical, stenographic, and other personnel employed by the Board at the end of the prior fiscal year. The projections for the current fiscal year and subsequent fiscal year shall include, for each such year, estimates of the number of cases to be appealed to the Board and an evaluation of the Board's ability, based on existing and projected personnel levels, to ensure timely disposition of such appeals as required by subsection (a) of this section.".

SEC. 104. Subsections (a) and (b) of section 4003 are amended by inserting ", after notice to the claimant of such additional information together with an opportunity to be heard in connection with such information," after "concerned" both places it appears.

SEC. 105. Section 4004 is amended—

(1) by inserting "after affording the claimant an opportunity for a hearing and shall be based exclusively on evidence and material of record in the proceeding

and on applicable provisions of law" before the period at the end of the second sentence in subsection (a);

(2) in subsection (b)—

(A) by striking out "in the form of official reports from the proper service department"; and

(B) by adding at the end the following new sentence: "A judicial decision upholding, in whole or in part, the disallowance of a claim under chapter 72 of this title shall not diminish the Board's discretionary authority under this subsection to reopen the claim and review the Board's former decision."; and

(3) by amending subsection (d) to read as follows:

"(d) After reaching a decision in each case, the Board shall promptly mail notice of its decision to the claimant and the claimant's authorized representative, if any, at the last known address of the claimant and at the last known address of the claimant's authorized representative, if any. Each decision of the Board shall include—

"(1) a written statement of the Board's findings and conclusions, and reasons or bases therefor, on all material issues of fact, law, and matters of discretion presented on the record; and

"(2) an order granting appropriate relief or denying relief."

SEC. 106. Section 4005(d)(5) is amended by striking out "will base its decision on the entire record and".

SEC. 107. Section 4009 is amended by adding after subsection (b) the following new subsection:

"(c) Whenever there exists in the evidence of record in an appeal case a substantial disagreement between the substantiated findings or opinions of two physicians with respect to an issue material to the outcome of the case, the Board shall, upon the request of the claimant and, after taking appropriate action to attempt to resolve the disagreement, arrange for an advisory medical opinion in accordance with the procedure prescribed in subsection (b) of this section. If the Board denies the request of such claimant for such an opinion, the Board shall prepare and provide to the claimant and the claimant's authorized representative, if any, a statement setting forth the basis for its determination.".

SEC. 108. (a) Chapter 71 is amended by adding at the end thereof the following new sections:

"§ 4010. Adjudication procedures

"(a) For purposes of conducting any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, the Administrator may administer oaths and affirmations, examine witnesses, and receive evidence.

"(b) Any oral, documentary, or other evidence, even though inadmissible under the rules of evidence applicable to judicial proceedings, may be admitted in a hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, but the Administrator, under regulations of the Administrator, may provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

"(c) In the course of any proceeding before the Board, any party to such proceeding or such party's authorized representative shall be afforded opportunity—

"(1) at a reasonable time prior thereto as well as during such proceeding, to examine and, on payment of a fee prescribed pursuant to section 3302(b) of this title (not to exceed the direct cost of duplication), obtain copies of the contents of the case files and all documents and records to be used by the Veterans' Administration at such proceeding;

"(2) to present witnesses and evidence, subject only to such restrictions as may be set forth in regulations of the Administrator, pursuant to subsection (b) of this section, as to materiality, relevance, and undue repetition;

"(3) to make oral argument and submit written contentions, in the form of a brief or similar document, on substantive and procedural issues;

"(4) to submit rebuttal evidence;

"(5) to present medical opinions and request an independent advisory medical opinion pursuant to section 4009(c) of this title; and

"(6) to serve written interrogatories on any person, including employees of the Veterans' Administration, which interrogatories shall be answered separately and fully in writing and under oath unless written objection thereto, in whole or in part, is filed with the Administrator by the person to whom the interrogatories are directed or such person's representative.

The fee provided for in clause (1) of this subsection may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on account of the party's inability to pay or for other good cause shown. In the event of any objection, filed under clause (6) of this subsection, the Administrator shall, pursuant to regulations which the Administrator shall prescribe establishing standards consistent with standards for protective orders applicable in the United States District Courts, evaluate such objection and issue an order (A) directing that, within such period as the Administrator shall specify, the interrogatory or interrogatories objected to be answered as served or answered after modification, or (B) indicating that the interrogatory or interrogatories are no longer required to be answered. If any person upon whom interrogatories are served under this section fails to answer or fails to provide responsive answers to any such interrogatories within thirty days after service or such additional time as the Administrator may allow, the Administrator shall, upon a statement or showing by the party who served such interrogatories of general relevance and reasonable scope of the evidence sought, issue a subpena pursuant to section 3311 of this title (with enforcement of such subpena to be available pursuant to section 3313 of this title) for such person's appearance and testimony on such interrogatories at a deposition on written questions, at a location within one hundred miles of where such person resides, is employed, or transacts business.

"(d) In the course of any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, an employee of the Veterans' Administration may at any time disqualify himself or herself, on the basis of personal bias or other cause, from adjudicating the claim. On the filing by a party in good faith of a timely and sufficient affidavit averring personal bias or other cause for disqualification on the part of such an employee, the Administrator shall determine the matter as a part of the record and decision in the case.

"(e) The transcript or recording of testimony and the exhibits, together with all papers and requests filed in the proceeding, and the decision of the Board shall constitute the exclusive record for decision in accordance with section 4004(a) of this title, and shall be available for inspection by any party to such proceeding, or such party's authorized representative, at reasonable times and places and, on the payment of a fee prescribed pursuant to section 3302(b) of this title (not to exceed the direct cost of duplication), shall be copied for the claimant or such claimant's authorized representative within a reasonable time. Such fee may be waived by the Administration, pursuant to regulations which the Administrator shall prescribe, on account of the party's inability to pay or for other good cause shown.

"(f) Notwithstanding section 4004(a) of this title, section 554(a) of ttile 5, or any other provision of law, adjudication and hearing procedures prescribed in this title and in regulations prescribed by the Administrator under this title for the purpose of administering veterans' benefits shall be exclusive with respect to hearings, investigations, and other proceedings in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration.

"§ 4011. Notice of procedural rights

"In the case of any denial, in whole or in part, of a claim for benefits under laws administered by the Veterans' Administration, the Administrator shall, at each procedural stage relating to the disposition of such a claim, beginning with denial after an initial review or determination and including the furnishing of a statement of the case and the making of a final determination by the Board, provide to the claimant and such claimant's authorized representative, if any, written notice of the procedural rights of the claimant. Such notices shall be on such forms as the Administrator shall prescribe by regulation and shall include, in easily understandable language, with respect to proceedings before the Veterans' Administration, (1) descriptions of all subsequent procedural stages provided for by statute, regulation, or Veterans' Administration policy, (2) descriptions of all rights of the claimant expressly provided for in or pursuant to this chapter, of the claimant's rights to a hearing, to reconsideration, to appeal, and to representation, and of any specific procedures necessary to obtain the various forms of review available for consideration of the claim, and (3) such other information as the Administrator, as a matter of discretion, determines would be useful and practical to assist the claimant in obtaining full consideration of the claim.".

(b) The table of sections at the beginning of such chapter is amended by adding at the end the following new items:

"4010. Adjudication procedures.
"4011. Notice of procedural rights.".

TITLE II—VETERANS' ADMINISTRATION RULE MAKING

SEC. 201. (a) Subchapter II of chapter 3 is amended by adding at the end the following new section:

"§ 221. Rule making

"Notwithstanding the provisions of subsection (a)(2) of section 553 of title 5, the promulgation of rules and regulations by the Administrator shall be subject to the requirements of section 553 of title 5.".

(b) The table of sections at the beginning of such chapter is amended by adding at the end thereof the following:

"221. Rule making.".

TITLE III—JUDICIAL REVIEW

SEC. 301. Subsection (a) of section 211 is amended by striking out "sections 775, 784" and inserting in lieu thereof "sections 775 and 784 and chapter 72 of this title".

SEC. 302. (a) Part V is amended by adding after chapter 71 the following new chapter:

"CHAPTER 72—JUDICIAL REVIEW

"Sec.
"4025. Jurisdiction.
"4026. Scope of review.
"4027. Remands.
"4028. Survival of actions.
"4029. Appellate review.

"§ 4025. Jurisdiction

"(a) After any final decision of the Administrator (as defined in subsection (c) of this section) adverse to a claimant in a matter involving a claim for benefits under any law administered by the Veterans' Administration, such claimant may obtain a review of such decision in a civil action commenced within one hundred and eighty days after the mailing to the claimant of notice of such decision pursuant to section 4004 of this title. Such action shall be brought against the Administrator in the district court of the United States for the judicial district in which the plaintiff resides or the plaintiff's principal place of business is located, or in the district court of the United States for the judicial district where the principal offices of the Board of Veterans' Appeals (established under section 4001 of this title) are located.

"(b) In any matter not directly involving a claim for benefits under any law administered by the Veterans' Administration, section 211(a) of this title shall not operate as a bar to a civil action otherwise authorized by law.

"(c) For the purposes of this chapter and section 3404 of this title:

"(1) The term 'final decision of the Administrator' means—

"(A) a final determination of the Board of Veterans' Appeals pursuant to section 4004(a) or 4004(b) of this title; or

"(B) a dismissal of an appeal by the Board of Veterans' Appeals pursuant to section 4005 or 4008 of this title.

"(2) The term 'claims for benefits' means—

"(A) an initial claim filed under section 3001 of this title;

"(B) a challenge to a decision of the Administrator reducing, suspending, or terminating benefits; or

"(C) any request by or on behalf of the claimant for reopening, reconsideration, on further consideration in a matter described in clause (A) or (B) of this paragraph.

"(d) The provisions of this chapter shall not apply to matters arising under chapter 19 or 37 of this title.

"(e) The complaint initiating an action under subsection (a) of this section shall contain sufficient information to permit the Administrator to identify and locate the plaintiff's Veterans' Administration records.

"(f) The Administrator shall file, together with the answer to a complaint filed pursuant to subsection (a) of this section, a certified copy of the records upon which the findings of fact and decision complained of are based or, if the Administrator determines that the cost of filing copies of all such records is unduly expensive, the Administrator shall file a complete index of all documents, transcripts, or other materials comprising such records. After such index is filed and after considering requests from all parties, the court shall require the Administrator to file certified copies of such indexed items as the court deems relevant to its consideration of the case.

"(g) In an action brought pursuant to subsection (a) of this section, the court shall have the power, upon the pleadings and the records specified in subsection (f) of this section, to enter judgment in accordance with section 4026 of this title or remand the case in accordance with section 4026 or 4027 of this title.

"§ 4026. Scope of review

"(a) In any action brought under section 4025 of this title, the reviewing court, to the extent necessary to its decision and when presented, shall—

"(1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions;

"(2) compel action of the Administrator unlawfully withheld; and

"(3) hold unlawful and set aside decisions, findings, and conclusions of the Administrator found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

"(D) without observance of procedure required by law.

"(b)(1) If the reviewing court in such an action finds the Administrator's finding on an issue or issues of fact to be arbitrary, capricious, or an abuse of discretion, the court shall specify where it finds the record to be deficient and shall, prior to entering any judgment reversing such decision, remand the case a single time to the Administrator for further action not inconsistent with the court's order. In so remanding, the court shall specify a reasonable period within which the Administrator shall complete the required action and, if such action is not completed within the time specified by the court, the matter shall (except as provided in paragraph (2)(B) of this subsection) be returned to the court for its action.

"(2)(A) Notwithstanding subsection (a) of this section, the reviewing court in any action brought under section 4025 of this title shall not enter a judgment that both reverses a decision of the Administrator on an issue of fact and substitutes a different percentage rating of a service-connected disability from that determined by the Administrator.

"(B) A matter remanded to the Administrator under paragraph (1) of this subsection shall not be returned to the court under the second sentence of such paragraph solely on an issue of the percentage rating of a service-connected disability.

"(c) In making the determinations under subsection (a) of this section, the court shall review the whole record before the court pursuant to section 4025(f) of this title or those parts of such record cited by a party, and due account shall be taken of the rule of prejudicial error.

"(d) In no event shall findings of fact made by the Administrator be subject to trial de novo by the reviewing court.

"(e) When a final decision of the Administrator (as defined in section 4025(c) of this title) is rendered in any case and such decision is adverse to a party solely because of the failure of such party to comply with any applicable regulation of the Veterans' Administration, the court shall review only questions raised as to compliance with and the validity of the regulation.

"§ 4027. Remands

"In any action brought under section 4025 of this title, the reviewing court shall, on motion of the Administrator made before the expiration of the time specified for the filing of an answer to a complaint filed pursuant to subsection (a) of such section, allows a single remand of a case to the Administrator for further review by the Administrator. If such review is not completed within ninety days after the date of such remand, the matter shall be returned to the court for its action. At any time after the Administrator files an answer, the court may, in the exercise of its discretion, remand the case to the Administrator for further action by the Administrator and, if either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there is good cause for granting such leave, the court shall remand the case to the Administrator and order such additional evidence to be taken by the Administrator; in either case, the court may specify a reasonable period of time within which the Administrator shall complete the required action. After a case is remanded to the Administrator, and after further action by the Administrator, including consideration of any additional evidence, the Administrator shall modify, supplement, affirm, or reverse the findings of fact or decision, or both, and shall file with the court any such modification, supplementation, affirmation, or reversal of findings of fact or decision or both, as the case may be, and certified copies of any additional records and evidence upon which such modification, supplementation, affirmation, or reversal was based.

Any such modification, supplementation, affirmation, or reversal of the findings of fact or decision shall be reviewable by the court only to the extent provided in section 4026 of this title with respect to the review of the original findings of facts and decision.

"§ 4028. Survival of actions

"Any action brought under section 4025 of this title shall survive, notwithstanding any change in the person occupying the Office of the Administrator or any vacancy in such office.

"§ 4029. Appellate review

"The decisions of a district court pursuant to this chapter shall be subject to appellate review by the courts of appeals and the Supreme Court of the United States in the same manner as judgments in other civil actions.".

(b) The table of chapters at the beginning of title 38, United States Code, and the table of chapters at the beginning of part V are each amended by inserting after the item relating to chapter 71 the following new item:

"72. Judicial Review .... 4025".

SEC. 303. Section 1346(d) of title 28, United States Code, is amended by inserting "except as provided for in chapter 72 of title 38" before the period at the end thereof.

TITLE IV—ATTORNEYS' FEES

SEC. 401. Section 3404 is amended by striking our subsection (c) and inserting in lieu thereof the following:

"(c)(1) A claimant may pay attorney fees for services rendered in representing that claimant before the Veterans' Administration in connection with claims for benefits under laws administered by the Veterans' Administration, but only to the extent approved by the administrator under this subsection.

"(2) The Administrator shall approve attorney fees under this subsection if the fees are reasonable, but shall not approve such fees in an amount greater than permitted under paragraph (3).

"(3)(A) Except as provided in subparagraph (B) or (C) of this paragraph, the amount referred to in paragraph (2) of this subsection is the greater of $500 or the amount specified in regulations prescribed by the Administrator based on a change in national economic conditions after the date of the enactment of the Veterans' Administration Adjudication Procedure and Judicial Review Act.

"(B) The Administrator may approve under this subsection fees in an amount greater than that provided under subparagraph (A) if the Administrator, in the Administrator's discretion, finds in the particular case in which such fee is approved that extraordinary circumstances warrant such approval.

"(C) If the claimant and the attorney have an agreement that no fee is payable to the attorney unless all or any part of the relief sought is granted, the Administrator may approve under this section a fee in any amount not greater than 25 percent of the total amount of past-due benefits awarded on the basis of the claim.

"(4)(A) The approval or nonapproval of the Administrator under this section may be reviewed by a court only to determine whether the Administrator's action constituted an abuse of discretion.

"(B) The claimant or the attorney may commence a civil action for such review not later than 30 days after the date of notice of the award. Such action shall be commenced in the United States District court for the judicial district in which the claimant resides or the claimant principal place of business is located.

"(d)(1) In a civil action under section 4025 of this title—

"(A) the court may award to a prevailing party, other than the Administrator, reasonable attorneys fees and costs if the court finds that the position of the Administrator was not substantially justified or that special circumstances make such an award just; and

"(B) the court shall, subject to paragraph (2), determine and approve as a part of the judgment reasonable attorneys fees to be paid by the claimant for such representation.

"(2)(A) In such civil action, if any part of the relief sought by a claimant who is represented by an attorney is granted, and there is an agreement between the claimant and the attorney under which no fee is payable unless the matter was so resolved, the fee shall not exceed 25 percent of the total amount of any past-due benefits awarded on the basis of the claim.

"(B) If no part of such relief is so granted, the fee shall not exceed $750 and shall be set taking into account the extent to which there could have appeared to be a reasonable probability of success for such civil action when it was commenced.

SEC. 402. Section 3405 is amended by striking out "or" after "title," and striking out "him" and inserting in lieu thereof "such claimant or beneficiary, or (3) with intent to defraud, in any manner willfully and knowingly deceives, misleads, or threatens a claimant or beneficiary or prospective claimant or beneficiary under this title with reference to any matter covered by this title".

TITLE V—EFFECTIVE DATES

SEC. 501. This Act shall take effect on the first day of the first month beginning more than one hundred and eighty days after the date of the enactment of this Act, and the amendments made by title III shall apply with respect to decisions of the Board of Veterans' Appeals rendered on or after the date this Act takes effect.

I

100TH CONGRESS
2D SESSION

H. R. 5039

To amend title 38, United States Code, to provide for judicial review of rulemaking by the Veterans' Administration, to provide for the payment of reasonable fees to attorneys, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 13, 1988

Mr. MONTGOMERY (for himself and Mr. SOLOMON) (both by request) introduced the following bill; which was referred to the Committee on Veterans' Affairs

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A BILL

To amend title 38, United States Code, to provide for judicial review of rulemaking by the Veterans' Administration, to provide for the payment of reasonable fees to attorneys, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Veterans' Reassurance Act of 1988".

SEC. 2. Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or a repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code.

TITLE I—CLAIMS GENERALLY

CLAIMS PROCEDURES

SEC. 101. (a) Chapter 51 is amended by adding after subchapter III the following new subchapter IV:

"SUBCHAPTER IV—CLAIMS PROCEDURES

"Sec.
"3031. Adjudication procedures.
"3032. Notification of procedural rights.
"3033. Subpoenas.
"3034. Reopening of claims.

"§ 3031. Adjudication procedures

"(a) For purposes of conducting any hearing, investigation or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, the Administrator may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence in such a proceeding need not be admissible under the Federal Rules of Evidence, but the Administrator may provide by regulation for the exclusion of irrelevant, immaterial or unduly repetitious evidence. The credible oral testimony of claimants and other individuals shall receive full weight in the Administrator's determination of facts.

"(b)(1) In the course of any proceeding before the Administrator, any party (or party's representative) shall be afforded the opportunity—

"(A) beginning reasonably in advance of the fact-finding phase of such proceeding, to examine and obtain copies of the contents of the entire claims folder and all documents and records to be used by the Veterans' Administration in such proceeding;

"(B) to present any witnesses and evidence not excluded pursuant to subsection (a);

"(C) to present oral and written argument with respect to substantive and procedural issues;

"(D) to submit rebuttal evidence; and

"(E) to present medical opinion evidence and request the Administrator to seek advisory medical opinions pursuant to subsection (c).

"(2) A fee prescribed pursuant to section 3302(b) shall be required to obtain copies of documents and records under subparagraph (1)(A). Such fee shall not exceed the direct cost of duplication, and may be waived by the Administrator.

"(c) When there exists in the evidence of record in a claims proceeding a substantial disagreement among the credible findings or opinions of physicians with respect to an issue material to the outcome of the proceeding, the Administrator, upon due notice to the claimant and the claimant's representative (if any), shall determine whether there is an approximate balance of the evidence favoring and opposing a finding in favor of the claimant on such issue. If such a balance exists, the issue shall be determined in favor of the claimant. If such a balance does not exist, the Administrator shall secure one or more advisory medical opinions from the Chief Medical Director of the Veterans' Administration.

"(d) Upon the filing by a party of a good faith, timely affidavit sufficiently averring personal bias for disqualification of an employee of the Veterans' Administration involved in the decisional process, the Administrator shall determine whether such cause exists and shall, in case of an affirmative determination, remove such employee from consideration of the claim in question.

"(e) Notwithstanding section 554(a) of title 5 or any other provision of law, the adjudication and hearing procedures prescribed in this title and implementing regulations thereunder shall be exclusive with respect to hearings, investigations and other proceedings for the consideration of claims for benefits under laws administered by the Veterans' Administration.

"§ 3032. Notification of procedural rights

"In the case of any disallowance, in whole or in part, of a claim for benefits under any law administered by the Veterans' Administration, the Administrator shall, at each procedural stage relating to the disposition of such a claim, beginning with disallowance after an initial review or determination and including the furnishing of a statement of the case, the making of a final determination by the Board of Veterans' Appeals and such rights to judicial review as are provided by this title, provide to the claimant and the claimant's authorized representative, if any, written notice of the procedural rights of the claimant. Such notices shall include, in easily understandable language, (1) descriptions of all subsequent procedural stages provided for by statute, regulation or Veterans' Administration policy, (2) descriptions of all rights of the claimant provided for under this title, of the claimant's rights to an oral hearing, to reconsideration, to appeal, to representation and to reopening, and of any specific procedures necessary to obtain the various available forms of review of the claim, and (3) such other information as the Administrator determines would be useful or practical to assist the claimant in securing full consideration of the claim.

"§ 3033. Subpoenas

"(a) Upon the reasonable request of a claimant or potential claimant, the Administrator shall issue subpoenas to compel the attendance of witnesses at depositions or hearings, or require the production of documentary evidence (at or prior to a hearing) in accordance with section 3311. Any fees required to be paid to witnesses by such section shall be paid by the Administrator.

"(b) In the case of a subpoena issued pursuant to subsection (a), the enforcement procedures of section 3313 may be invoked by a claimant as well as by the Administrator.

"(c) In connection with a claim or potential claim under any law administered by the Veterans' Administration, affidavits and depositions may be taken, and oaths and affirmations administered, by the Administrator, his delegate or any individual authorized to administer oaths in the State where the individual giving the affidavit, deposition, oath, or affirmation is located.

"§ 3034. Reopening of claims

"A claim that has been disallowed, in whole or in part, shall be reopened and reconsidered by the Administrator upon the presentation of new and material evidence. Such evidence need not come from an official or governmental source.".

(b) The table of sections at the beginning of such chapter is amended by adding after the items relating to subchapter III the following new items:

"SUBCHAPTER IV—CLAIMS PROCEDURES

"3031. Adjudication procedures.
"3032. Notification of procedural rights.
"3033. Subpoenas.
"3034. Reopening of claims.".

(c) The amendments made by this section shall take effect on the first day of the first month beginning more than two hundred and seventy days after the enactment of this

Act, and shall apply to all claims pending on or after that date.

COMMUNICATIONS REGARDING CLAIMS

SEC. 102. (a) Chapter 57 is amended by adding at the end of subchapter I the following new section:

"§ 3306. Communications regarding claims

"Communications between any claimant or potential claimant and any individual (A) recognized as a representative under section 3402, (B) recognized as an agent or attorney under section 3404, or (C) acting pursuant to a power of attorney granted to any organization named in or approved under section 3402, respecting any claim or potential claim under any of the laws administered by the Veterans' Administration, shall be privileged from disclosure in connection with Federal and State proceedings to the same extent as communications between attorney and client. This section is not intended to limit the availability of any other privilege or protection from disclosure that may apply to information relating to such a claim or potential claim.".

(b) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 3305 the following new item:

"3306. Communications regarding claims.".

ATTORNEYS' FEES

SEC. 103. (a) Section 3404 is amended by striking out subsection (c) and inserting in lieu thereof the following:

"(c)(1) No fee shall be paid by a claimant for the prosecution of a claim for benefits under laws administered by the Veterans' Administration other than under this subsection or section 784.

"(2) Subject to the limitations of this subsection, the Administrator (or, in cases in which judicial review has been had under section 4004, the reviewing court of appeals) shall approve a reasonable attorneys' fee to be paid for the prosecution of such a claim.

"(3) Such fee shall be payable only to the extent an agreement between the claimant and the claimant's attorney so provides.

"(4) Such fee shall not exceed—

"(A) for cases in which judicial review has been had under section 4004, the greater of $750 or 25 per centum of the total amount of past-due benefits awarded on the basis of the claim; and

"(B) for all other cases, the greater of $500 or 25 per centum of the total amount of past-due benefits awarded on the basis of the claim.

"(5) The Administrator or reviewing court may approve a fee in excess of the limitations of paragraph (3) in any case in which extraordinary circumstances so warrant.

"(6) Not less often than biennially, the Administrator shall by regulation adjust the dollar limitations of paragraph (4) to reflect changes in the cost of living.

"(7) Nothing in this subsection is intended to prohibit awards of attorneys' fees under section 504 of title 5, section 2412 of title 28 or any other law, or pursuant to an agreement providing for payment of fees other than by a claimant.".

(b) The amendment made by this section shall apply with respect to all claims pending on or after the date of enactment.

LIABILITY IN CONNECTION WITH CLAIMS FOR BENEFITS

SEC. 104. Section 3402 is amended by adding at the end thereof the following new subsection:

"(d)(1) An individual recognized as a representative under this section, recognized as an agent or attorney under section 3404(a), or acting pursuant to a power of attorney granted to an organization named in or approved under this section, may be held liable for an injury arising out of or related to the investigation, preparation, presentation or prosecution of a claim only to the extent that such injury is due to the intentional misconduct of such individual. The party alleging such misconduct shall bear the burden of proof. This paragraph shall not apply to any case where there is an agreement between the claimant and the individual (or the individual's employer) providing for the payment of a fee by the claimant (including a fee contingent upon the success of the claim) in connection with the claim in question.

"(2) An organization named in or approved under this section may be held liable for an injury arising out of or related to the investigation, preparation, presentation or prosecution of a claim only if an individual employed by that organization (within the meaning of section 3401 of the Internal Revenue Code of 1986) is found liable as specified in paragraph (1), a responsible official of the organization knew of the misconduct of such individual at a time when the organization could have prevented the injury complained of, and the organization thereafter negligently failed to prevent such injury. The party alleging such knowledge, ability and failure to act shall bear the burden of proof as to each such element of liability.".

RULE MAKING; LIMITED JUDICIAL REVIEW

SEC. 105. (a) Subsection (c) of section 210 is amended—

(1) by redesignating paragraphs (2) and (3) as paragraphs (3) and (4), respectively; and

(2) by inserting the following new paragraph (2):

"(2)(A) The provisions of section 553 of title 5 (other than subsection (a)(2)) shall apply to rulemaking by the Administrator.

"(B) On the petition of any aggrieved person, the courts of appeals (other than the Court of Appeals for the Federal

Circuit) shall have jurisdiction to review any order of the Administrator (whether or not the promulgation of such order was subject to section 553 of title 5). Any such petition shall be filed, within sixty days after the order is made public, in the court of appeals for the circuit in which the petitioner resides or in the Court of Appeals for the District of Columbia Circuit.

"(C) For purposes of this paragraph—

"(i) 'order' shall include rule, regulation, guideline, instruction, interpretation or precedent, but shall not include a decision with respect to a claim that is reviewable by the Board of Veterans' Appeals under section 4004; and

"(ii) 'aggrieved person' shall include any organization named in or approved under section 3402.

"(D) The right of review granted by this paragraph is not intended to derogate from any right now or hereafter existing to question the validity of any order of the Administrator in connection with another action or proceeding.".

(b) Subsection (a) of section 211 is amended by striking out "sections 775, 784," and inserting in lieu thereof "sections 210, 775, 784 and 4004,".

(c) The amendments made by this section shall apply with respect to all orders made after the date of enactment of this Act, except that the provisions of section 210(c)(2)(A), as added by this section, shall apply only with respect to rule making begun on or after the date of enactment of this Act.

TITLE II—BOARD OF VETERANS' APPEALS

INDEPENDENT BOARD OF VETERANS' APPEALS

SEC. 201. (a) Section 4001 is amended to read as follows:

"§ 4001. United States Board of Veterans' Appeals

"(a) The United States Board of Veterans' Appeals (hereafter in this chapter referred to as the "Board") hereby is established as an independent agency in the executive branch. The Board shall consist of sixty-five members, appointed by the President by and with the advice and consent of the Senate from among persons who by reason of training, education or experience are qualified to carry out the functions of the Board under this chapter. The President shall designate one member of the Board to serve as Chair and one member to serve as Vice Chair.

"(b)(1) The terms of members of the Board shall be six years, except that—

"(A) members first taking office after the date of enactment of the Veterans' Reassurance Act of 1988 shall serve, as designated by the President at the time of appointment, ten for a term of one year, eleven for a term of two years, eleven for a term of three years, eleven for a term of four years, eleven for a term of five years and eleven for a term of six years; and

"(B) a vacancy caused by the death, resignation or removal of any member prior to the expiration of the term for which such member was appointed shall be filled only for the remainder of such unexpired term.

Any member of the Board may be removed by the President for neglect of duty or malfeasance in office.

"(2) The Chair shall be responsible on behalf of the Board for the administrative operations of the Board. Subject to review by the full Board on the written request of any five members, the Chair shall appoint such employees, including a Clerk, as the Chair deems necessary to assist in the performance of the Board's functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, relating to classification and general pay rates.

"(3) The principal office of the Board shall be in the District of Columbia, but sections of the Board regularly shall hear cases in appropriate locations throughout the United States.

"(c) The Board shall have a seal, which shall be judicially noticed. Copies of any public documents, records or papers belonging to or in the files of the Board, when authenticated by the seal of the Board and certified by the Clerk or the Clerk's designee, shall be evidence equal with the originals thereof.

"(d) The Board may make such rules as may be necessary for the orderly transition of its proceedings.

"(e) The Chair of the Board shall submit an annual report to the appropriate committees of the Congress, not later than December 31, 1989, and annually thereafter, on the experience of the Board during the prior fiscal year. Such report also shall include projections for the current and succeeding fiscal years. The report shall contain; at a minimum, the number of cases appealed to the Board during the fiscal year, the number of cases pending before the Board at the opening and closing of the fiscal year, the number of such cases that were filed during each of the twenty-four months preceding the fiscal year, the average length of time between filing and final disposition of an appeal during the fiscal year, and the number of professional, administrative, clerical, stenographic and other personnel employed by the Board at the close of the fiscal year. The report also shall include information regarding any cases in which Veterans' Administration rules, regulations or orders were set aside by the Board during the fiscal year, and on any judicial proceedings with respect to such actions. The projections for the current and succeeding fiscal years shall include, for each such year, estimates of the number of cases to be appealed to the Board and an evaluation of the Board's ability, based upon existing and projected personnel and resource levels, to ensure timely disposition of such appeals. Such report shall be a public document.".

(b)(1) The chapter heading at the beginning of chapter 71 is amended to read as follows:

"CHAPTER 71—UNITED STATES BOARD OF VETERANS' APPEALS".

(2) The table of sections at the beginning of chapter 71 is amended by striking out the words "Composition of Board of Veterans' Appeals" following the figure "4001." and inserting in lieu thereof "United States Board of Veterans' Appeals.".

(c) Upon the effective date of this section, members of the Board of Veterans' Appeals now existing in the Veterans' Administration shall automatically become interim members of the Board, each to serve in that capacity at the rate provided herein for such position until a successor shall have been appointed and qualified, or one year shall have passed, whichever occurs earlier.

(d) The amendments made by this section shall take effect on the first day of the first month beginning more than two hundred and seventy days after the enactment of this Act, except that members of the Board, including the Chair and Vice Chair, may be appointed at any time after the enactment of this Act.

ASSIGNMENT OF BOARD MEMBERS

SEC. 202. (a) Subsection (a) of section 4002 is amended to read as follows:

"(a) The Chair may from time to time divide the Board into sections of three members, assign the members of the Board thereto and designate the chief thereof. A majority of the members of a section shall consitute a quorum. When the Board reconsiders a case (other than pursuant to subsection (c) of section 4004), the Chair may expand the reviewing section to a maximum of twelve members. In cases to be referred to an expanded panel under subsection (c) of section 4004, the provisions of that subsection shall apply.".

(b) The amendment made by this section shall take effect on the first day of the first month beginning more than 270 days after the enactment of this Act.

DETERMINATIONS BY THE BOARD; RIGHT TO RESPOND TO NEW INFORMATION

SEC. 203. (a) Section 4003 is amended to read as follows:

"§ 4003. Determinations by the Board; reconsideration

"(a) Except as otherwise provided in this title, the determination of the section shall be the final determination of the Board. If the votes of the members of a section sitting on a question be equally divided, the Chair shall appoint from among the other members of the Board a member to cast the deciding vote after reviewing the record.

"(b)(1) The Board may, on its own motion or the motion of a party, reconsider or remand a case to correct an obvious error in the record or claims file (whether or not presented in connection with the instant appeal), or may upon the basis of additional information, reconsider or remand its initial decision and, should reconsideration be elected, reach a different conclusion. The authority granted by this paragraph is in addition to any other authority granted to the Board by this title.

"(2) Before deciding whether to order reconsideration of a case, the Board shall furnish notice of any new or additional information proposed to be considered to the claimant and shall afford the claimant the opportunity to be heard in connection with such information.

"(c) Upon reaching a decision in a case, the Board promptly shall mail a copy of its decision to the claimant, at the claimant's last known address, and to the claimant's authorized representative, if any, at such representative's last known address. Each decision of the Board shall include—

"(1) a written statement of the Board's findings and conclusions, and reasons or bases therefor, on all material issues of fact and law and on matters of discretion presented on the record; and

"(2) an order granting appropriate relief or denying relief.".

(b) The amendment made by this section shall take effect on the first day of the first month beginning more than 270 days after the enactment of this Act.

JURISDICTION OF THE BOARD; LIMITED JUDICIAL REVIEW

SEC. 204. (a) Section 4004 is amended to read as follows:

"§ 4004. Jurisdiction of the Board

"(a) All questions on claims for benefits under the laws administered by the Veterans' Administration, including refusals to reopen claims, shall be subject to review by the Board. The Board also shall have jurisdiction to review decisions of the Administrator under section 3404(c). Reviews by the Board of final decisions of the Administrator shall include, where necessary or appropriate, reviews of non-final actions of the Administrator.

"(b) A claim disallowed by the Board may be reopened and allowed where, subsequent to such disallowance, new and material evidence is presented or other good cause for reopening is shown. In such instances, the Board may direct the Administrator to reopen and reconsider the claim, or may reopen and reconsider the claim itself.

"(c)(1) Where necessary to the Board's decision in an appeal, and subject to the provisions of this subsection, the Board may set aside as unlawful any rule, regulation, statement of general policy, interpretation of general applicability or other order of the Administrator (other than the schedule of ratings for disabilities under section 355) that is contrary to the Constitution or laws of the United States.

"(2) When any section of the Board (including a section reconsidering a case) decides to take action under paragraph (1), it shall inform the Chair, who promptly shall constitute a special review section composed of the members of the section favoring action under paragraph (1) and such additional members of the Board, chosen at random, as are needed to reach a total of fifteen members. The special review section may hold a hearing before reaching its decision, which shall be by majority vote and shall be the decision of the Board for purposes of this section.

"(3) An order of the Board setting aside a rule, regulation, policy statement, interpretation or other order pursuant to this subsection shall take effect thirty days after the order is issued unless the court of appeals orders otherwise.

"(d) On the petition of any aggrieved party (including the Administrator), the courts of appeals (other than the Court of Appeals for the Federal Circuit) shall have jurisdiction to review final decisions of the Board acting or refusing to act under subsection (c), but such jurisdiction shall extend only to the review of such decisions. A petition for review shall be filed within sixty days after the decision is issued, but the Board or a court of appeals may extend this time period for up to sixty additional days. A petition for review may be filed in the court of appeals for the circuit in which the petitioner resides or in the Court of Appeals for the District of Columbia Circuit.

"(e) A judicial decision under section 210 sustaining, in whole or in part, the disallowance of a claim shall not diminish the authority of the Board under subsection (b) of this section to authorize or direct the reopening and reconsideration of a claim.".

(b) The amendment made by this section shall take effect on the first day of the first month beginning more than two hundred and seventy days after the enactment of this Act, and shall apply to all cases pending before the Board on or after that date.

BOARD PROCEDURES

SEC. 205. (a) Section 4005 is amended—

(1) in subsection (a), by striking out "the Administrator" and inserting in lieu thereof "the Board";

(2) by amending paragraph (4) of subsection (d) to read as follows:

"(4) The Board may presume that the appellant is in agreement with any statement of fact contained in the statement of the case to which no exception is taken during the course of the appeal.";

(3) by amending paragraph (5) of subsection (d) to read as follows:

"(5) The Board will base its decision on the entire record, including parts of the record not specified or referred to in the statement of the case and issues not certified to the Board by the Veterans' Administration, and may dismiss any appeal that fails to allege specific error of fact or law in the determination being appealed. For purposes of this paragraph, the term 'record' shall include the entire claims file."; and

(4) by adding the following new paragraphs at the end of subsection (d):

"(6)(A) Upon the request of a claimant or the Administrator, the Board may issue subpoenas to compel the attendance of witnesses within a radius of one hundred miles from the place of hearing, or to require the production of documentary evidence, with respect to any matter within the jurisdiction of the Board.

"(B) Any person required by such subpoena to attend as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States. Any such fees shall be paid by the Board if the subpoena is requested by a claimant and by the Administrator in all other cases.

"(C) The Board may delegate to employees of the Board the authority granted by this paragraph, subject to review by the Board upon a timely motion to limit or quash.

"(D) The enforcement procedures established by section 3313 may be invoked by the Board, the Administrator or a claimant.

"(7) In connection with any matter within the jurisdiction of the Board, affidavits and depositions may be taken, and oaths and affirmations administered, by the Board, its delegate, the Administrator or any individual authorized to administer oaths in the State where the individual giving the affidavit, deposition, oath or affirmation is located.

"(8) Evidence taken by the Board need not be admissible under the Federal Rules of Evidence, but the Board may provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence.

"(9) Where a claimant seeks to present to the Board evidence that was not presented to the Administrator, the Board may remand the case to the Administrator or may receive the evidence itself. In the latter case, the party (or party's representative) shall be afforded the opportunity—

"(A) to present any witnesses and evidence not excluded pursuant to paragraph (8);

"(B) to submit rebuttal evidence; and

"(C) to present medical opinion evidence.

"(10) The Board shall afford any party whose case is before it the opportunity to present oral and written argument with respect to all relevant substantive and procedural issues.".

(b) The amendments made by this section shall take effect on the first day of the first month beginning more than two hundred and seventy days after the enactment of this Act, and shall apply to all cases pending before the Board on or after that date.

RESOLUTION OF MEDICAL DISAGREEMENTS

SEC. 206. (a) Section 4009 is amended by adding after subsection (b) the following new subsection:

"(c) Whenever the Board finds that there exists in the evidence of record in an appeal case a substantial disagreement among the credible findings or opinions of physicians with respect to an issue material to the outcome of the case, the Board shall determine, upon due notice to all parties and their representatives, whether there is an approximate balance of evidence favoring and opposing a finding in favor of the claimant on such issue. If such a balance exists, the issue shall be determined in favor of the claimant. If such a balance does not exist, the Board shall, upon the request of the claimant, arrange for an advisory medical opinion in accordance with the procedure prescribed in subsection (b).".

(b) The amendment made by this section shall take effect on the first day of the first month beginning more than two hundred and seventy days after the enactment of this Act, and shall apply to all cases pending before the Board on or after that date.

AUTHORIZATION OF APPROPRIATIONS

SEC. 207. (a) Chapter 71 is amended by adding after section 4009 the following new section:

"§ 4010. Authorization of appropriations

"There are authorized to be appropriated such sums as are necessary to carry out the provisions of this chapter.".

(b) the table of sections at the beginning of such chapter is amended by adding after the item relating to section 4009 the following new item:

"4010. Authorization of appropriations.".

TITLE III—TECHNICAL AMENDMENTS

SEC. 301. Title 5 is amended—

(1) in section 5315, by adding at the end thereof "Chair and Vice Chair, United States Board of Veterans' Appeals."; and

(2) in section 5316, by adding at the end thereof "Members, United States Board of Veterans' Appeals (63).".

SEC. 302. So much of the personnel, property, records and unexpended balances of appropriations, allocations and other funds employed, used, held, available or to be made available in connection with the functions transferred from the Veterans' Administration to the United States Board of

Veterans' Appeals under this Act as the Director of the Office of Management and Budget shall determine shall be transferred to the United States Board of Veterans' Appeals at such time or times as such Director shall provide, except that no such transferred unexpended balances shall be used for purposes other than those for which the appropriation originally was made. The Director of the Office of Management and Budget, in consultation with the Administrator of Veterans' Affairs, shall provide for such further measures and dispositions as such Director deems necessary to effectuate the purposes of this Act.

100TH CONGRESS
2D SESSION

S. 2292

To amend title 38, United States Code, to provide for judicial review of rulemaking by the Veterans' Administration, to allow attorneys' fees in cases involving veterans' claims for benefits, and to make other improvements in the provision of veterans' benefits.

IN THE SENATE OF THE UNITED STATES

APRIL 18 (legislative day, APRIL 11), 1988

Mr. MURKOWSKI introduced the following bill; which was read twice and referred to the Committee on Veterans' Affairs

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A BILL

To amend title 38, United States Code, to provide for judicial review of rulemaking by the Veterans' Administration, to allow attorneys' fees in cases involving veterans' claims for benefits, and to make other improvements in the provision of veterans' benefits.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Veterans' Judicial Review Act".

SEC. 2. REFERENCES TO TITLE 38, UNITED STATES CODE.

Except as otherwise expressly provided, whenever in this Act an amendment or a repeal is expressed in terms of an amendment to, or a repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision to title 38, United States Code.

SEC. 3. JUDICIAL REVIEW OF AGENCY RULEMAKING.

(a) APA PROCEDURES.—(1) Chapter 3 of title 38, United States Code, is amended by inserting after section 222 the following new section:

"§ 223. Rulemaking: procedures and judicial review

"(a) The provisions of section 553 of title 5 (other than subsection (a)(2) thereof) shall apply, according to the provisions of that section, to any matter relating to loans, grants, or benefits under the jurisdiction of the Administrator.

"(b) Any action of the Administrator subject to subsection (a) (other than the adoption or readjustment of the schedule of ratings for disabilities under section 355 of this title) may be reviewed in accordance with chapter 7 of title 5. Such review shall be brought in the United States Courts of Appeals.".

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 222 the following new item:

"223. Rulemaking: procedures and judicial review.".

(b) CONFORMING AMENDMENT.—Section 211(a) of such title is amended by striking out "except as provided in sections 775, 784" and inserting in lieu thereof "except as provided in sections 223, 775, 784, 4010,".

SEC. 4. ATTORNEYS' FEES.

(a) Section 3404 is amended by striking out subsection (c) and inserting in lieu thereof the following:

"(c) The Board of Veterans' Appeals shall approve reasonable attorneys' fees to be paid by the claimant to attorneys for representation before the Veterans' Administration (including representation before the Board of Veterans' Appeals) in connection with a claim for benefits under laws administered by the Veterans' Administration, but in no event shall such attorneys' fees exceed—

"(1) for any services rendered prior to the issuance of a statement of the case under section 4005(d) of this title, or for any services not otherwise provided for, $10; or

"(2) for services in connection with a challenge to the validity of regulations of the Veterans' Administration provided in section 4010, rendered on or after the issuance of a statement of the case under section 4005(d) of this title—

"(A) if the claimant and an attorney have entered into an agreement under which no fee is payable to such attorney unless the challenge is resolved in a manner favorable to the claimant, 25 percent of the total amount of any past-due benefits awarded on the basis of the claim; or

"(B) if the claimant and an attorney have not entered into such an agreement, the lesser of—

"(i) the fee agreed upon by the claimant and the attorney; or

"(ii) $500, or such greater amount as may be specified from time to time in regulations which the Board shall prescribe based on changed national economic conditions subsequent to the date of enactment of this subsection, except that the Board may, in its discretion, determine and approve a fee in excess of $500, or such greater amount if so specified, in an individual case involving extraordinary circumstances warranting a higher fee.

"(d) Actions before the Court of Appeals—

"(1) If, in an action brought in a United States Court of Appeals under section 223 or 4010 of this title, the matter is resolved in a manner favorable to a claimant who was represented by an attorney, the court shall determine and allow a reasonable fee for such representation to be paid to the attorney by the claimant.

"(2) If, in an action brought in a United States Court of Appeals under section 223 or 4010 of this title, the matter is not resolved in a manner favorable to a claimant who was represented by an attorney, the court, taking into consideration the likelihood at the time such action was filed that the claimant would prevail, may determine and allow a reasonable fee not in excess of $750 to be paid to the attorney by the claimant for the representation of such claimant.

"(3) For the purposes of this subsection, a matter shall be considered resolved in a manner favorable to the claimant when all or any part of the relief sought is granted.

"(4) In an action brought in a United States Court of Appeals under section 223 or 4010 of this title, the court may award to a prevailing party, other than the Administrator, reasonable attorneys' fees and costs in accordance with the provisions of subsection (d) of section 2412 of title 28.

"(e) To the extent that past-due benefits are awarded in proceedings before the Veterans' Administration (including proceedings before the Board of Veterans' Appeals), the Administrator shall direct that payment of any attorneys' fee that has been determined and allowed under this section (including allowances made by a Court of Appeals pursuant to subsection (d)(1) or (d)(2) of this section) be made out of such past-due benefits, but in no event shall the Administrator withhold for the purpose of such payment any portion of benefits payable for a period subsequent to the date of the final decision in such case.

"(f) The provisions of this section shall apply only to cases involving claims for benefits under the laws administered by the Veterans' Administration, including petitions for review by the Administrator pursuant to section 4010, and such provisions shall not apply in cases in which the Veterans' Administration is the plaintiff or in which other attorneys' fee statutes are applicable.".

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall apply with respect to cases in which a statement of the case is issued after the date of enactment of this Act.

SEC. 5. BOARD OF VETERANS' APPEALS.

(a) REVIEW OF REGULATIONS OF THE VETERANS' ADMINISTRATION.—(1) Section 4004 of title 38, United States Code, is amended:

(A) by striking out subsection (c); and

(B) by redesignating subsection (d) as subsection (c).

(2) Chapter 71 of such title is amended by adding at the end the following new sections:

"§ 4010. Review of regulations

"(a) RIGHT OF REVIEW.—Where an appellant before the Board has challenged the validity of regulations of the Veterans' Administration involved in his or her case (other than the validity of the schedule of ratings for disabilities under section 355 of this title), he or she shall be afforded the right to have such challenges adjudicated and resolved by the Board, subject to review by the United States Court of Appeals.

"(b) PROCEDURE.—(1) When challenges to the validity of regulations of the Veterans' Administration involved in an appeal (other than challenges to the validity of the schedule of ratings for disabilities under section 355 of this title) have been raised, the Board shall adjudicate and resolve such challenges separately from the adjudication and resolution of all other issues in the appellant's case.

"(2) Upon the final resolution of the case of which the challenge referred to in subsection (b)(1) is a part, the Board's determination of the validity of the regulations challenged shall be subject to review in the United States Court of Appeals. The subject matter of such action shall be limited to the validity of the regulations of the Veterans' Administration involved in the appeal, to include the Board's determination, separate from its adjudication of all other issues in the appellant's case, of the validity of those regulations.

"(3) The appellant shall have 60 days from the date of the final resolution referred to in subsection (b)(2) within which to initiate a petition for review before the United States Court of Appeals—

"(A) If such action is not initiated within such period, the Board's determination shall be final and conclusive and no other official or any court of the United States shall have power to review any such decision by an action in the nature of mandamus or otherwise, except as provided in subsection (b)(4).

"(B) Where the reviewing court has reviewed and resolved the questions raised, the case shall be remanded to the Board for further proceedings.

"(C) Notwithstanding any other provision of law, the Board's determination of all other issues on appeal shall be final and conclusive and no other official or any court of the United States shall have power to review any such determination by an action in the nature of mandamus or otherwise.

"(4) In any case in which the Board rules that a regulation of the Veterans' Administration is invalid, the Administrator may, upon the final resolution of such case, petition for review of such ruling to the United States Court of Appeals for the Federal Circuit. Such petition shall be filed within 60 days from the date of the final resolution referred to in subsection (b)(2). The appellant before the Board shall be notified of such filing and shall be entitled to appear in such action.

"(5) In the case of an appellant, a request for review pursuant to this section shall be brought in the United States Court of Appeals where the appellant resides, or in the United States Court of Appeals for the Federal Circuit.

"(6) To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of the terms of the regulations challenged. The reviewing court shall hold unlawful and set aside regulations found to be—

"(A) contrary to constitutional right, power, privilege, or immunity; or

"(B) in excess of statutory jurisdiction, authority, or limitations, short of statutory right; or

"(C) resting upon a policy judgment, reasoning or factual premise so unacceptable as to render the regulation arbitrary.

In no event shall the facts of the appeal or the application of any law or regulation to those facts be subject to review by the reviewing court unless they raise a constitutional issue, nor shall the validity of the schedule of ratings for disabilities under section 355 of this title be subject to review under this section.

"(7) The right of review granted under this section is in addition to the right of review under section 223 of this title.

"(8) For the purposes of review under this section, the term 'regulation' includes those statements of general policy and interpretations of general applicability which have been adopted by the Administrator.".

(b) REVIEW OF ATTORNEYS' FEES.—Chapter 71 of such title is amended by adding at the end of the following new section:

"§ 4011. Review of attorneys' fees

"The Board may review the reasonableness of any fee arrangement for payment of attorneys' fees by a claimant during proceedings within the Veterans' Administration or before the Board. If the Board finds that any amount to be payable from past due benefits is excessive or unreasonable, the Board may reduce such amount. A decision of the Board under this section is final and may not be reviewed by any court.".

(c) CHANGES TO THE BOARD.—(1) Section 4001 of such title is amended:

(A) in the first sentence of subsection (a), by striking the words "directly responsible to the Administrator";

(B) by amending subsection (b) to read as follows:

"(b) The Chairman and Vice Chairman of the Board shall be appointed by the President with the advice and consent of the Senate for a term of 15 years. Members of the Board shall be appointed by the Chairman with the approval of the President for a term of 15 years.";

(C) in the first sentence of paragraph (3) of subsection (c) of such section, by striking out "In each annual report to the Congress under section 214 of this title, the Administrator shall provide" and inserting in lieu thereof "The Chairman of the Board shall submit an annual report to the Congress providing";

(D) in the second sentence of paragraph (3) of subsection (c) of such section, by striking out "the Administrator" and inserting in lieu thereof "the Chairman"; and

(E) by adding the following new subsections at the end of such section:

"(d) Notwithstanding any other provision of law, no member of the Board, and no temporary member while so serving, shall be eligible for or receive, directly or indirectly, bonuses in addition to salary.

"(e) The Administrator shall allocate sufficient resources (including sufficient personnel with the necessary skills and qualifications) to enable the Board to carry out its responsibilities under this chapter.".

(3) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 4009 the following new items:

"4010. Review of regulations.
"4011. Review of attorneys' fees.".

100TH CONGRESS
2D SESSION

S. 11

IN THE HOUSE OF REPRESENTATIVES

JULY 26, 1988

Referred to the Committee on Veterans' Affairs

AN ACT

To amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain final decisions of the Board of Veterans' Appeals; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) this Act may be cited as the "Veterans' Administration Adjudication Procedure and Judicial Review Act".

(b) Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code.

TITLE I—VETERANS' ADMINISTRATION ADJUDICATION

SEC. 101. (a) Chapter 51 is amended by adding at the end of subchapter I the following new section:

"§ 3007. Burden of proof; benefit of the doubt

"(a) Except when otherwise provided by the Administrator in accordance with the provisions of this title, a claimant for benefits under laws administered by the Veterans' Administration shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Administrator shall assist a claimant in developing the facts pertinent to his or her claim.

"(b) When, after consideration of all evidence and material of record in any proceeding before the Veterans' Administration involving a claim for benefits under laws administered by the Veterans' Administration, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of such claim, the benefit of the doubt in resolving each such issue will be given to the claimant, but nothing in this section shall be construed as shifting from a claimant to the Administrator the burden described in subsection (a) of this section.".

(b)(1) The table of chapters at the beginning of title 38, United States Code, and the table of chapters at the beginning of part IV of such title are each amended in the item relating to chapter 51 by striking out "Applications" and inserting in lieu thereof "Claims".

(2) The heading of such chapter is amended to read as follows:

"CHAPTER 51—CLAIMS, EFFECTIVE DATES, AND PAYMENTS".

(c)(1) The table of sections at the beginning of such chapter is amended in the item relating to subchapter I by striking out "APPLICATIONS" and inserting in lieu thereof "CLAIMS".

(2) The heading of subchapter I of such chapter is amended to read as follows:

"SUBCHAPTER I—CLAIMS".

(d) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 3006 the following new item:

"3007. Burden of proof; benefit of the doubt.".

SEC. 102. Section 3311 is amended by adding at the end the following new sentences: "Subpenas authorized under this section shall be served by any individual authorized by the Administrator by (1) delivering a copy thereof to the individual named therein, or (2) mailing a copy thereof by registered or certified mail addressed to such individual at such individual's last known dwelling place or principal place of business. A verified return by the individual so serving the subpena setting forth the manner of service, or, in the case of service by registered or certified mail, the return post office receipt therefor signed by the individual so served, shall be proof of service.".

SEC. 103. (a) Section 4001(a) is amended—

(1) by striking out "directly responsible to the Administrator" in the first sentence and inserting in lieu thereof "(hereinafter referred to as the 'Chairman')"; and

(2) by inserting before the period at the end of the second sentence "in a timely manner".

(b)(1) Section 4001(b) is amended to read as follows:

"(b)(1) The Chairman shall be appointed by the President, by and with the advice and consent of the Senate, for a term of five years. An individual may serve as Chairman for not more than three complete terms. The Chairman may be removed by the President for good cause.

"(2)(A) The members of the Board shall be appointed by the Chairman for a term of nine years. A member appointed to fill a vacancy resulting from the resignation, death, or removal of a member before the end of the term for which the original appointment was made shall serve for the remainder of the unexpired term. Members may be reappointed without limitation. The Chairman shall designate one member as Vice Chairman. Such member shall serve as Vice Chairman at the pleasure of the Chairman.

"(B) A member of the Board may be removed only by the Chairman and only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Merit Systems Protection Board. Section 554(a)(2) of title 5 shall not apply to a removal action under this subparagraph. In such a removal action, a member shall have the rights set out in section 7513(b) of title 5.".

(2) The President shall appoint a Chairman of the Board of Veterans' Appeals under section 4001(b)(1) of title 38, United States Code (as amended by paragraph (1)), not later than one year after the date of the enactment of this Act. The individual who is serving as Chairman of the Board of Veterans' Appeals on the date of the enactment of this Act may continue to serve as Chairman until a successor is appointed. If such individual is appointed as Chairman under

such section, none of the service of such individual as Chairman before the date of that appointment shall be considered for the purpose of determining the term of appointment or eligibility for reappointment under such section.

(3) Appointments of members of the Board of Veterans' Appeals under subsection (b)(2)(A) of section 4001 of title 38, United States Code (as amended by paragraph (1)), may not be made until a Chairman has been appointed under subsection (b)(1) of such section. An individual who is serving as a member of the Board on the date of the enactment of this Act may continue to serve as a member until the earlier of the date on which the individual's successor is appointed under subsection (b)(2)(A) of such section or the expiration of the 180-day period that begins on the day after the Chairman is appointed under subsection (b)(1) of such section.

(4) Notwithstanding the provision in section 4001(b)(2) of title 38, United States Code (as amended by paragraph (1)), that specifies the term for which members of the Board of Veterans' Appeals shall be appointed, of the first members appointed under such section—

(1) 21 members shall be appointed for a term of three years;

(2) 22 members shall be appointed for a term of six years; and

(3) 22 members shall be appointed for a term of nine years.

The first Vice Chairman of the Board designated under such section shall be selected from among the members appointed for terms of six years or nine years.

(5) Section 5315 of title 5, United States Code, is amended by adding at the end the following:

"Chairman, Board of Veterans' Appeals.".

(c) Section 4001 is further amended by adding at the end the following new subsections:

"(d) The Chairman shall submit a report to the Committees on Veterans' Affairs of the Senate and the House of Representatives, not later than December 31, 1988, and annually thereafter, on the experience of the Board during the prior fiscal year together with projections for the fiscal year in which the report is submitted and the subsequent fiscal year. Such report shall contain, as a minimum, information specifying the number of cases appealed to the Board during the prior fiscal year, the number of cases pending before the Board at the beginning and end of such fiscal year, the number of such cases which were filed during each of the 36 months preceding the then current fiscal year, the average length of time a case was before the Board between the time of the filing of an appeal and the disposition during the prior fiscal year, and the number of members of, and the professional, administrative, clerical, stenographic, and other personnel employed by, the Board at the end of the prior fiscal year. The projections for the current fiscal year and subsequent fiscal year shall include, for each such year, estimates of the number of cases to be appealed to the Board and an evaluation of the Board's ability, based on existing and projected personnel levels, to ensure timely disposition of such appeals as provided for by subsection (a) of this section.

"(e) Notwithstanding any other provision of law, no member or temporary or acting member of the Board shall be eligible for or receive, directly or indirectly, bonuses (in addition to salary) relating to service on the Board.".

SEC. 104. Section 4003 is amended to read as follows:

"§ 4003. Determinations by the Board

"(a)(1) A determination, when concurred in by the requisite number of members of a section, shall be the final decision of the Board.

"(2) The requisite number of members of a section that must concur in a determination for it to be considered a final decision is—

"(A) for an allowance of a claim, a majority of the members of the section; or

"(B) for a denial of a claim, all members of the section.

"(b) When there is a disagreement among the members of the section in any case in which unanimity is required for a final decision, the concurrence of the Chairman with the majority of the members of such section shall constitute the final decision of the Board. The Chairman may, instead of voting, expand the size of the section for determination of that case, and the concurrence of a majority of the members of the expanded section shall constitute the final decision of the Board.

"(c) If, without the vote of a temporary member designated under section 4001(c)(1) of this title or the vote of an acting member designated under section 4002(a)(2)(A)(ii) of this title, a section would be evenly divided in the determination of any claim—

"(1) such member shall not vote; and

"(2) the Chairman shall expand, by not less than two members, the size of the section for determination of that claim.

"(d) Notwithstanding subsection (a) and (b) of this section, the Board on its own motion may correct an obvious error in the record or may reach a contrary conclusion upon the basis of additional information from the department of the Secretary concerned after notice of such additional information is furnished to the claimant and the claimant is provided an opportunity to be heard in connection with such information.".

SEC. 105. Section 4004 is amended—

(1) in subsection (a)—

(A) by striking out "involving" in the first sentence and inserting in lieu thereof "for"; and

(B) by inserting before the period at the end of the second sentence "after affording the claimant an opportunity for a hearing and shall be based exclusively on evidence and material of record in the proceeding and on applicable provisions of law";

(2) by striking out subsection (b) and inserting in lieu thereof the following:

"(b)(1) Except as provided in paragraph (2) of this subsection, when a claim is disallowed by the Board, it may not thereafter be reopened and allowed and no claim based upon the same factual basis shall be considered.

"(2) Following such a disallowance, the Board (directly or through the agency of original jurisdiction, as described in section 4005(b)(1) of this title)—

"(A) when new and material evidence is presented or secured, shall authorize the reopening of a claim and a review of the Board's former decision; and

"(B) for good cause shown, may authorize the reopening of a claim and a review of the Board's former decision.

"(3) A judicial decision under subchapter II of chapter 71 of this title, upholding, in whole or in part, the disallowance of a claim shall not diminish the Board's authority set forth in paragraph (2) of this subsection to authorize the reopening of a claim and a review of the former decision."; and

(3) by striking out subsection (d) and inserting in lieu thereof the following:

"(d) After reaching a decision in a case, the Board shall promptly mail notice of its decision to the claimant and the claimant's authorized representative, if any, at the last known address of the claimant and at the last known address of the claimant's authorized representative, if any. Each decision of the Board shall include—

"(1) a written statement of the Board's findings and conclusions, and reasons or bases therefor, on all material issues of fact and law and on matters of discretion presented on the record; and

"(2) an order granting appropriate relief or denying relief.".

SEC. 106. Section 4005(d) is amended—

(1) by striking out paragraph (4) and inserting in lieu thereof the following:

"(4) The claimant may not be presumed to agree with any statement of fact or law contained in the statement of the case to which the claimant does not specifically express agreement."; and

(2) in paragraph (5), by striking out "will base its decision on the entire record and".

SEC. 107. (a) Section 4009 is amended—

(1) by striking out the section heading and inserting in lieu thereof the following:

"§ 4009. Medical opinions";

and

(2) by adding at the end the following new subsections:

"(c)(1) Whenever there exists in the evidence of record in an appeal case a substantial disagreement between the substantiated findings or opinions of two physicians with respect to an issue material to the outcome of the case, the Board shall, upon the request of the claimant and after taking appropriate action to attempt to resolve the disagreement, arrange for an advisory medical opinion in accordance with the procedure prescribed in subsection (b) of this section. The claimant may appeal a denial of a request for such an opinion to the Chairman.

"(2) If the Board or the Chairman upon appeal denies a request for an advisory medical opinion, the Board, or the

Chairman after the appeal, shall prepare and provide to the claimant and the claimant's authorized representative, if any, a statement setting forth the basis for the denial and, in the case of a denial of such request by the Board, a notice of the claimant's right to appeal the denial to the Chairman.

"(3) Actions of the Board under this subsection, including any such denial concurred in by the Chairman (if appealed), shall be final and conclusive, and no other official or any court of the United States shall have the power or jurisdiction to review any aspect of any such action by an action in the nature of mandamus or otherwise, the provisions of subchapter II of chapter 71 of this title to the contrary notwithstanding.

"(d) If a member of the Board receives the medical opinion of any physician relating to any appeal under consideration by such member (other than a medical opinion of a physician on the section of the Board considering such appeal) or an employee of the Board in the consideration of such appeal receives such an opinion, the Board shall furnish such opinion to the claimant and shall afford the claimant 60 days in which to submit a response to such opinion before the Board issues a final decision on the appeal. The Board shall consider any such response and shall include in the final decision a discussion of such opinion, the response (if any), and the effect of such opinion and response on the Board's decision.".

(b) The table of sections at the beginning of chapter 71 is amended by striking out the item relating to section 4009 and inserting in lieu thereof the following:

"4009. Medical opinions.".

SEC. 108. (a) Chapter 71 is further amended by adding at the end the following new sections:

"§ 4010. Adjudication procedures

"(a) For purposes of conducting any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, the Administrator and the members of the Board may administer oaths and affirmations, examine witnesses, and receive evidence.

"(b) Any oral, documentary, or other evidence, even though inadmissible under the rules of evidence applicable to judicial proceedings, may be admitted in a hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, but the Administrator and the Chairman, under regulations which the Administrator and the Chairman shall jointly prescribe, may provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

"(c)(1) In the course of any proceeding before the Board, any party to such proceeding or such party's authorized representative shall be afforded the opportunities—

"(A) to examine and, on payment of a fee prescribed pursuant to section 3302(b) of this title (not to exceed the direct cost of duplication), obtain copies of the contents of the case files and all documents and records to be used by the Veterans' Administration at such proceeding;

"(B) to present witnesses and evidence, subject only to such restrictions as may be set forth in regulations prescribed pursuant to subsection (b) of this section, as to materiality, relevance, and undue repetition;

"(C) to make oral argument and submit written contentions, in the form of a brief or similar document, on substantive and procedural issues;

"(D) to submit rebuttal evidence;

"(E) to present medical opinions and request an independent advisory medical opinion pursuant to section 4009(c) of this title; and

"(F) to serve written interrogatories on any person, including any employee of the Veterans' Administration, which interrogatories shall be answered separately and fully in writing and under oath unless written objection thereto, in whole or in part, is filed with the Chairman by the person to whom the interrogatories are directed or such person's representative.

"(2) The fee provided for in paragraph (1)(A) of this subsection may be waived by the Chairman, pursuant to regulations which the Administrator shall prescribe, on the basis of the party's inability to pay or for other good cause shown.

"(3) In the event of any objection filed under paragraph (1)(F) of this subsection, the Chairman shall, pursuant to regulations which the Chairman shall prescribe establishing standards consistent with standards for protective orders applicable in the United States District Courts, evaluate such objection and issue an order (A) directing that, within such period as the Chairman shall specify, the interrogatory or interrogatories objected to be answered as served or answered after modification, or (B) indicating that the interrogatory or interrogatories are no longer required to be answered.

"(4) If any person upon whom interrogatories are served under paragraph (1)(F) of this subsection fails to answer or fails to provide responsive answers to all of the interrogatories within 30 days after service or such additional time as the Chairman may allow, the Chairman, upon determining that the party propounding such interrogatories has shown the general relevance and reasonableness of the scope of the interrogatories, shall issue a subpena under section 3311 of this title (with enforcement of such subpena to be available under section 3313 of this title) for such person's appearance and testimony on such interrogatories at a deposition on written questions, at a location within 100 miles of where such person resides, is employed, or transacts business.

"(d)(1) A claimant may request a hearing before a traveling section of the Board. Cases shall be scheduled for hearing before such a section in the order in which the requests for hearing are received by the Board.

"(2) If a claimant makes a request for a hearing before a traveling section of the Board and, by reason of limited time for the conduct of hearings by such section at the location for the requested hearing, such claimant's appeal is not scheduled for hearing or the hearing is not conducted, the Board shall afford such claimant an opportunity to present the case to the Board in a hearing conducted by telephone or video connection before a section of the Board or in a videotape of a hearing conducted for the Board by Veterans' Administration adjudication personnel at a regional office of the Veterans' Administration. An audiotape or videotape of such hearing shall be included in the record of the appeal and considered by the Board in the same manner as recordings of testimony and documentary evidence are considered.

"(e) In the course of any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, an employee of the Veterans' Administration (including an employee of the Board of Veterans' Appeals) may at any time disqualify himself or herself, on the basis of personal bias or other cause, from adjudicating the claim. On the filing by a party in good faith of a timely and sufficient affidavit averring personal bias or other cause for disqualification on the part of such an employee, the Administrator, as to proceedings other than proceedings before the Board, or the Chairman, as to proceedings before the Board, shall determine the matter as a part of the record and decision in the case, pursuant to regulations prescribed jointly by the Administrator and the Chairman.

"(f) The transcript or recording of testimony and the exhibits, together with all papers and requests filed in the proceeding, and the decision of the Board (1) shall constitute the exclusive record for decision in accordance with section 4004(a) of this title, (2) shall be available for inspection by any party to such proceeding, or such party's authorized representative, at reasonable times and places, and (3) on the payment of a fee prescribed under section 3302(b) of this title (not to exceed the direct cost of duplication), shall be copied for the claimant or such claimant's authorized representative within a reasonable time. Such fee may be waived by the Chairman, pursuant to regulations which the Administrator shall prescribe, on the basis of the party's inability to pay or for other good cause shown.

"(g) Notwithstanding section 4004(a) of this title, section 554(a) of title 5, or any other provision of law, adjudication and hearing procedures prescribed in this title and in regulations prescribed by the Administrator, as to proceedings other than proceedings before the Board, or by the Chairman, as to proceedings before the Board, or by the Administrator and the Chairman jointly, under this title for the purpose of administering veterans' benefits shall be exclusive with respect to hearings, investigations, and other proceedings in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration.

"§ 4011. Notice of procedural rights and other information

"In the case of any disallowance, in whole or in part, of a claim for benefits under laws administered by the Veterans' Administration, the Administrator, as to proceedings other than proceedings before the Board, or the Chairman, as to proceedings before the Board, shall, at each procedural stage relating to the disposition of such a claim, beginning with disallowance after an initial review or determination, and including the furnishing of a statement of the case and the making of a final decision by the Board, provide to the claimant and such claimant's authorized representative, if any, written notice of the procedural rights of the claimant. Such notice shall be on such forms as the Administrator or the Chairman, respectively, shall prescribe by regulation and shall include, in easily understandable language, with respect to proceedings before the Veterans' Administration and the Board (1) descriptions of all subsequent procedural stages provided for by statute, regulation, or Veterans' Administration policy, (2) descriptions of all rights of the claimant expressly provided for in or pursuant to this chapter, of the claimant's rights to a hearing, to reconsideration, to appeal, and to representation, and of any specific procedures necessary to obtain the various forms of review available for consideration of the claim, (3) in the case of an appeal to the Board, the rights to and opportunities for a hearing provided in section 4010(d) of this title, and (4) such other information as the Administrator or the Chairman, respectively, as a matter of discretion, determines would be useful and practical to assist the claimant in obtaining full consideration of the claim.".

(b) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 4009 the following new items:

"4010. Adjudication procedures.
"4011. Notice of procedural rights and other information.".

SEC. 109. (a) In order to evaluate the feasibility and desirability of alternative methods of (1) seeking to ensure the resolution of claims before the Administrator of Veterans' Affairs or the Board of Veterans' Appeals for benefits under laws administered by the Veterans' Administration as promptly and efficiently as feasible following the filing of a notice of disagreement pursuant to section 4005 (as amended by section 106 of this Act) or 4005A of title 38, United States Code, and (2) affording claimants the opportunity for a hearing before or review by a disinterested authority at a location as convenient and on as timely a basis as possible for each claimant, the Administrator and the Chairman of the Board of Veterans' Appeals are each authorized to conduct a study commencing not later than 1 year after the date of the enactment of this Act, for a period of 24 months, involving either or both of the alternative methods described in subsection (b) of this section for resolution of claims.

(b)(1) In not more than three geographic areas, the Administrator is authorized to provide an intermediate-level adjudication process whereby each claimant may, within the time afforded such claimant under paragraph (3) of section 4005(d) or 4005A(b) of title 38, United States Code, to file an appeal, request a de novo hearing at the agency of original jurisdiction (as described in section 4005(b)(1) of such title) before a panel of three Veterans' Administration employees, each of whose primary responsibilities include adjudicative functions but none of whom shall have previously considered the merits of the claim at issue. Following such hearing, such panel shall render a decision and prepare a new statement of the case in accordance with the requirements of paragraphs (1) and (2) of section 4005(d) of such title. Such new statement of the case shall, for all purposes relating to appeals under chapter 71 of such title, be considered to be a statement of the case as required by such paragraph (1).

(2) In not more than three other geographic areas, the Chairman is authorized to provide for an enhanced schedule of visits, on at least a quarterly basis each year, by a panel or panels of the Board to conduct formal recorded hearings pursuant to section 4002 of such title in such areas.

(c) Not later than 6 months after the completion of such study, the Administrator and the Chairman, as appropriate, shall report to the Committees on Veterans' Affairs of the Senate and the House of Representatives on the results of the study, including an evaluation of the cost factors associated with each alternative studied and with any appropriate further implementation thereof, the impact on the workload of each regional office involved in such study, and the impact on the annual caseload of the Board resulting from each alternative studied, together with any recommendations for administrative or legislative action, or both, as may be indicated by such results.

SEC. 110. Section 3010(i) is amended—

(1) by inserting "(1)" after "(i)"; and

(2) by adding at the end the following new paragraph:

"(2) Whenever any disallowed claim is reopened and thereafter allowed on the basis of new and material evidence in the form of official reports from the department of the Secretary concerned, the effective date of commencement of the benefits so awarded shall be the date on which an award of benefits under the disallowed claim would have been effective had the claim been allowed on the date it was disallowed.".

TITLE II—VETERANS' ADMINISTRATION RULE MAKING

SEC. 201. (a) Subchapter II of chapter 3 is amended by adding at the end the following new section:

"§ 223. Rule making

"(a) For the purposes of this section—

"(1) the term 'regulation' includes—

"(A) statements of general policy, instructions, and guidance issued or adopted by the Administrator; and

"(B) interpretations of general applicability issued or adopted by the Administrator; and

"(2) the term 'rule' has the same meaning as is provided in section 551(4) of title 5.

"(b) Notwithstanding the provisions of subsection (a)(2) of section 553 of title 5, the promulgation of rules and regulations by the Administrator, other than rules or regulations pertaining to agency management or personnel or to public property or contracts, shall be subject to the requirements of section 553 of title 5.

"(c) Rules and regulations issued or adopted by the Administrator shall be subject to judicial review as provided in subchapter II of chapter 71 of this title.".

(b) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 222 the following new item:

"223. Rule making.".

TITLE III—JUDICIAL REVIEW

SEC. 301. Section 211(a) is amended by striking out "sections 775, 784" and inserting in lieu thereof "sections 775 and 784 and subchapter II of chapter 71 of this title".

SEC. 302. (a) Chapter 71 is further amended—

(1) by inserting after the table of sections the following new heading:

"SUBCHAPTER I—GENERAL";

and

(2) by adding at the end thereof the following new subchapter:

"SUBCHAPTER II—JUDICIAL REVIEW

"§ 4025. Right of review; commencement of action

"(a) For the purposes of this chapter—

"(1) 'final decision of the Board of Veterans' Appeals' means—

"(A) a final decision of the Board pursuant to section 4004 (a) or (b) of this title; or

"(B) a dismissal of an appeal by the Board pursuant to section 4005 or 4008 of this title;

"(2) 'claim for benefits' means—

"(A) an initial claim filed under section 3001 of this title;

"(B) a challenge to a decision of the Administrator reducing, suspending, or terminating benefits; or

"(C) any request by or on behalf of the claimant for reopening, reconsideration, or further consideration in a matter described in clause (A) or (B) of this paragraph;

"(3) 'interested party', with respect to a rule or regulation issued or adopted by the Administrator, means any person substantially affected by such rule or regulation; and

"(4) 'disability rating schedule' means the schedule of ratings adopted and readjusted under section 355 of this title and any provision made by the Administrator under section 357 of this title for the combination of ratings.

"(b)(1)(A) Subject to subparagraph (B) of this paragraph, the following matters are subject to judicial review under this subchapter:

"(i) A final decision of the Board of Veterans' Appeals in accordance with subsection (c).

"(ii) A rule or regulation issued or adopted by the Administrator when review of such regulation is requested by a claimant in connection with an action under subsection (c).

"(iii) A rule or regulation so issued or adopted when review of such regulation is requested by any interested party in an action brought only for the purpose of obtaining review of such rule or regulation.

"(B) In an action involving any matter subject to judicial review under this subchapter, a court may not direct or otherwise order that any disability rating schedule issued or adopted by the Administrator be modified.

"(2) Any action for judicial review authorized by this subchapter shall be brought by a claimant or an interested party in the United States Court of Appeals for the circuit in which the plaintiff resides or the plaintiff's principal place of business is located, or in the United States Court of Appeals for the District of Columbia Circuit.

"(c) Except as provided in subsection (g) of this section, after any final decision of the Board of Veterans' Appeals adverse to a claimant in a matter involving a claim for benefits under any law administered by the Veterans' Administration, such claimant may obtain a review of such decision in a civil action commenced within 180 days after notice of such decision is mailed to such claimant pursuant to section 4004(d) of this title.

"(d) The complaint initiating an action under subsection (c) of this section shall contain sufficient information to permit the Administrator to identify and locate the plaintiff's records in the custody or control of the Veterans' Administration.

"(e) Not later than 30 days after filing the answer to a complaint filed pursuant to subsection (d) of this section, the Administrator shall file a certified copy of the records upon which the decision complained of is based or, if the Administrator determines that the cost of filing copies of all such records is unduly expensive, the Administrator shall file a complete index of all documents, transcripts, or other materials comprising such records. After such index is filed and after considering requests from all parties, the court shall require the Administrator to file certified copies of such indexed items as the court considers relevant to its consideration of the case.

"(f) In an action brought under subsection (c) of this section, the court shall have the power, upon the pleadings and the records specified in subsection (e) of this section, to enter judgment in accordance with section 4026 of this title or remand the case in accordance with such section or section 4027 of this title.

"(g)(1) No action may be brought under this section unless (A) the initial claim for benefits is filed pursuant to section 3001 of this title on or before the last day of the fifth fiscal year beginning after the effective date of this section, and (B) the complaint initiating such action is filed not more than 180 days after notice of the first final decision of the Board of Veterans' Appeals rendered after the last day of such fiscal year is mailed to the claimant pursuant to section 4004(d) of this title. If the case is reopened pursuant to section 4004(b)(2)(A) of this title within 180 days after such notice is mailed, the next final decision shall, for purposes of this subsection, be considered the first final decision of the Board.

"(2) No action may be brought under this section with respect to matters arising under chapters 19 and 37 of this title.

"§ 4026. Scope of review

"(a)(1) In any action brought under section 4025 of this title, the court, to the extent necessary to its decision and when presented, shall, except as provided for in section 4025(b)(1)(B) of this title—

"(A) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Administrator;

"(B) compel action of the Administrator unlawfully withheld;

"(C) hold unlawful and set aside decisions, findings (other than those described in clause (D) of this paragraph), conclusions, rules, and regulations issued or adopted by the Administrator, the Board of Veterans' Appeals, the Administrator and the Chairman of the Board jointly, or the Chairman found to be—

"(i) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(ii) contrary to constitutional right, power, privilege, or immunity;

"(iii) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

"(iv) without observance of procedure required by law; and

"(D) in the case of a finding of material fact made in reaching a decision on a claim for benefits under laws administered by the Veterans' Administration, hold unlawful and set aside such finding when it is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside.

"(2) Before setting aside any finding of fact under paragraph (1)(D) of this subsection, the court shall specify the deficiencies in the record upon which the court would set aside such finding and shall remand the case one time to the Board of Veterans' Appeals for further action not inconsistent with the order of the court in remanding the case. In remanding a case under the first sentence of this paragraph, the court shall specify a reasonable period of time within which the Board shall complete the ordered action. If the Board does not complete action on the case within the specified period of time, the case shall be returned to the court for its further action.

"(b) In any action brought under section 4025 of this title, the whole record before the court pursuant to subsection (e) of such section shall be subject to review, the court shall review those parts of such record cited by a party, and due account shall be taken of the rule of prejudicial error.

"(c) In no event shall findings of fact made by the Administrator or the Board of Veterans' Appeals be subject to trial de novo by the court.

"(d) When a final decision of the Board of Veterans' Appeals is adverse to a party and the sole stated basis for such decision is the failure of such party to comply with any applicable regulation issued or adopted by the Administrator or the Board, the court shall review only questions raised as to compliance with and the validity of the regulation.

"§ 4027. Remands

"(a) If either party to an action brought under section 4025 of this title applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that such additional evidence is material and that there is good cause for granting such leave, the court shall remand the case to the Board of Veterans' Appeals and order such additional evidence to be taken by the Board. The court may specify a reasonable period of time within which the Board shall complete the required action.

"(b) After a case is remanded to the Board of Veterans' Appeals under subsection (a) of this section, and after further action by the Board, including consideration of any additional evidence, the Board shall modify, supplement, affirm, or reverse the findings of fact or decision, or both, and shall file with the court any such modification, supplementation, affirmation, or reversal of the findings of fact or decision or both, as the case may be, and certified copies of any additional records and evidence upon which such modification, supplementation, affirmation, or reversal was based.

"§ 4028. Survival of actions

"Any action brought under section 4025 of this title shall survive notwithstanding any change in the person occupying the office of Administrator or any vacancy in such office.

"§ 4029. Appellate review

"The decisions of a court of appeals pursuant to this chapter shall be subject to appellate review by the Supreme Court of the United States in the same manner as judgments in other civil actions.".

(b) The table of sections at the beginning of such chapter is amended—

(1) by inserting before the item relating to section 4001 the following new item:

"SUBCHAPTER I—GENERAL";

and

(2) by adding after the item (added by section 108(b) of this Act) relating to section 4011 the following new items:

"SUBCHAPTER II—JUDICIAL REVIEW

"4025. Right of review; commencement of action.
"4026. Scope of review.

"4027. Remands.
"4028. Survival of actions.
"4029. Appellate review.".

SEC. 303. Section 1346(d) of title 28, United States Code, is amended by inserting before the period at the end thereof a comma and "except as provided in subchapter II of chapter 71 of title 38".

TITLE IV—ATTORNEYS' FEES

SEC. 401. Section 3404 is amended by striking out subsection (c) and inserting in lieu thereof the following:

"(c) The Chairman of the Board of Veterans' Appeals shall approve reasonable attorneys' fees to be paid by the claimant to attorneys for representation, other than in an action brought under section 4025 of this title, in connection with a claim for benefits under laws administered by the Veterans' Administration. In no event may such attorneys' fees exceed—

"(1) for any claim resolved prior to or at the time that a final decision of the Board is first rendered, $10; or

"(2) for any claim resolved after such time—

"(A) if the claimant and an attorney have entered into an agreement under which no fee is payable to such attorney unless the claim is resolved in a manner favorable to the claimant, 25 percent of the total amount of any past-due benefits awarded on the basis of the claim; or

"(B) if the claimant and an attorney have not entered into such an agreement, the lesser of—

"(i) the fee agreed upon by the claimant and the attorney; or

"(ii) $500, or such greater amount as may be specified from time to time in regulations which the Chairman of the Board shall prescribe based on changed national economic conditions subsequent to the date of the enactment of this subsection, except that the Chairman may determine and approve a fee in excess of $500, or such greater amount if so specified, in an individual case involving extraordinary circumstances warranting a higher fee.

"(d)(1) If, in an action brought under section 4025 of this title, the matter is resolved in a manner favorable to a claimant who was represented by an attorney, the court shall determine and allow a reasonable fee for such representation to be paid to the attorney by the claimant. When the claimant and an attorney have entered into an agreement under which the amount of the fee payable to such attorney is to be paid from any past-due benefits awarded on the basis of the claim and the amount of the fee is contingent on whether or not the matter is resolved in a manner favorable to the claimant, the fee so determined and allowed shall not exceed 25 percent of the total amount of any past-due benefits awarded on the basis of the claim.

"(2) If, in an action brought under section 4025 of this title, the matter is not resolved in a manner favorable to the claimant, the court shall ensure that only a reasonable fee, not in excess of $750, is paid to the attorney by the claimant for the representation of such claimant.

"(e) To the extent that past-due benefits are awarded in proceedings before the Administrator, the Board of Veterans' Appeals, or a court, the Administrator shall direct that payment of any attorneys' fee that has been determined and allowed under this section be made out of such past-due benefits, but in no event shall the Administrator withhold for the purpose of such payment any portion of benefits payable for a period subsequent to the date of the final decision of the Administrator, the Board of Veterans' Appeals, or the court making such award.

"(f) The provisions of this section shall apply only to cases involving claims for benefits under the laws administered by the Veterans' Administration, and such provisions shall not apply in cases in which the Veterans' Administration is the plaintiff or in which other attorneys' fee statutes are applicable.

"(g) For the purposes of this section—

"(1) the terms 'final decision of the Board of Veterans' Appeals' and 'claim for benefits' shall have the same meaning provided for such terms, respectively, in section 4025 (a) of this title; and

"(2) claims shall be considered as resolved in a manner favorable to the claimant when all or any part of the relief sought is granted.

"(h) In an action brought under section 4025 of this title, the court may award to a prevailing party, other than the Administrator, reasonable attorneys' fees and costs in accordance with the provisions of section 2412(d) of title 28.".

SEC. 402. Section 3405 is amended—

(1) by striking out "or" after "title,"; and

(2) by inserting a comma and "or (3) with intent to defraud, in any manner willfully and knowingly deceives, misleads, or threatens a claimant or beneficiary or prospective claimant or beneficiary under this title with reference to any matter covered by this title" before "shall".

TITLE V—EFFECTIVE DATES

SEC. 501. This Act and the amendments made by this Act shall take effect on the first day of the first month beginning not less than 180 days after the date of the enactment of this Act.

SEC. 502. A civil action authorized in subchapter II of chapter 71 of title 38, United States Code (as added by section 302(a) of this Act) may be instituted to review final decisions of the Board of Veterans' Appeals rendered on or after April 1, 1987.

Passed the Senate July 11 (legislative day, July 8), 1988.

Attest: WALTER J. STEWART,

Secretary.

Testimony of The Honorable David E. Bonior
Committee on Veterans' Affairs
Thursday, September 8, 1988
Judicial Review Legislation

Mr. Chairman, thank you for holding this hearing today and giving me the opportunity to submit testimony. I want to commend you for making time at this busy juncture in the session to move critically needed judicial review legislation through the House of Representatives. Mr. Chairman, you have been a great champion of veterans rights and a driving force in making certain that our nation's veterans receive fair treatment from the nation which they so bravely defended.

We have reached an important point today in the recent history of judicial review legislation. All of the major veterans groups support judicial review in some manner. Just a year ago, this was not the case. The Senate has passed a good bill, S. 11, which was authored by Sen. Alan Cranston, the chairman of the Senate Veterans' Affairs Committee. I am a cosponsor and strong supporter of H.R. 639, which was authored by the distinguished member of this Committee from Illinois, my good friend Lane Evans.

There is a broad range of proposals offered before the Committee today. All have some merit to them. My hope is that we will see a bill pass the Committee next week, followed with passage by the entire House of Representatives.

Let me make the case for why I think H.R. 639 ought to be the bill that passes. When the VA rules against the veteran in a claims decision, the veteran is not permitted to seek independent review of that decision. This is a fundamental right that almost all recipients of government aid have -- and one that ensures fairness. Our veterans served and sacrificed so that we may enjoy the liberty that is so cherished in this nation. Yet, when veterans feel they are treated unjustly by the very organization set up to assist them, they are prohibited by law from seeking redress through the courts.

The various pieces of legislation that are before the Committee, upon inspection, allow judicial review of various degrees. However, S. 11 and H.R. 639 are the only two that allow for court review of individual claims for benefits. The Murkowski and American Legion proposals allow for court review of the validity of VA regulations, but that merely sets into code what already exists.

To settle for that alternative is to settle for less -- preventing the veteran from truly gaining judicial review. We have seen in the managing of the VA during the Reagan Administration a disregard for the well-being of the veteran. Drastic budget cut proposals, arbitrary decision-making, and suppression of important data have brought harm to countless numbers of veterans. I firmly believe that court review of VA claims decisions would ensure that veterans get a fair deal.

H.R. 639 also rescinds the anachronistic law that limits attorneys' fees in a veterans claims case to ten dollars. Mr. Evans' legislation also calls for judicial review in the U.S. District Court, which provides greater access for the veteran than U.S. Courts of Appeals. Mr. Evans' proposal is a sound bill and one that deserves to be passed by this Committee.

Finally, I would like to ask the Committee to pass H.R. 639 for the sake of letting the bill get an airing by the entire House. Five times legislation similar to H.R. 639 has passed the Senate over the course of the last five Congresses. Five times that legislation has died in this Committee. Among members of the House, there is demonstrated support for H.R. 639. I urge you to pass this important legislation for the benefit of all veterans.

STATEMENT OF CONGRESSMAN TONY COELHO

IN SUPPORT OF

H.R.639

HOUSE COMMITTEE ON VETERANS AFFAIRS

September 8, 1988

MR. CHAIRMAN, first I want to thank you for your willingness to hold today's hearing on judicial review, to consider the merits of a number of bills dealing with judicial review including H.R. 639 (the bill which I have cosponsored along with our colleague Lane Evans and 146 other members), and your commitment to report a bill in the House this session.

I want to state my strong support for H.R. 639 and my hope that the committee will report this bill or a bill containing its provisions for floor consideration.

Judicial review for veterans make sense and is long overdue. It is a basic right to which all others--contractors, federal retirees, social security recipients, even federal prisoners and illegal aliens--have access; yet a right which is expressly denied by law to the very men and women who serve to defend and protect that right for others.

Those who oppose judicial review for veterans seem to be convinced that granting this basic right will somehow hurt veterans and reflect poorly on our existing VA adjudication system.

Let's assume the current system of adjudication is perfect. In my view that still should not preclude an individual veteran from enjoying the right to seek judicial review of his or her case if he or she contends that a grievance remains and he or she can get an attorney to take the case. We permit that with virtually every other kind of case. We permit social security claimants to pursue judicial review, we permit individuals dealing with virtually every other federal agency to pursue grievance cases not only through administrative review but also through judicial review.

Why not permit the same for veterans?

Granting the right to judicial review should not imply simultaneously--to my way of thinking--an indictment of our current VA procedures. Of course, even the best system always has room for improvement and I believe it is not unfair to say that the evidence suggests improvements should be made in the VA system.

That notwithstanding, however, I fail to understand the argument that veterans must continue to be denied their day in court if they wish to seek a day in court.

I support our existing VA claims review process, and I support continued strengthening and improvement of that process. But I am among those who advocate that one further step, Mr. Chairman. Let's stop "protecting" our veterans from that last level of review. Let's "burden" them with the right, if they feel they wish to exercise it, to have a day in court.

The key features of H.R. 639, Mr. Chairman, are:

It provides for court review of individual claims denied by the Board of Veterans Appeals.

It permits veterans to file suit in the nearest U.S. district court.

It adopts the Administrative Procedures Act "arbitrary and capricious" standard in defining the scope of court review (this is the standard used for most federal agencies).

It raises the current $10 fee limit for work done by an attorney on a case at either the VA Regional Office level or the Board of Veterans Appeals level to a fee range of from $0 to $500 if the veteran loses or to 0% to 25% of past due benefits won, if the veteran wins. It does not permit a percentage of future benefits.

It sets a fee range of from $0 to $750 for attorney work in court if the veteran loses, or 0% to 25% of past due benefits if the veteran wins. It does not permit a percentage of future benefits.

Once again, Mr. Chairman, thank you for considering H.R. 639 and the other bills before your committee, and I hope the final bill you report will incorporate these features of H.R. 639.

Thank you.

STATEMENT OF LEON E. PANETTA IN SUPPORT OF H.R. 639
JUDICIAL REVIEW FOR VETERANS
SEPTEMBER 8, 1988

Mr. Chairman and Members of the Committee, I appreciate this opportunity to testify in support of H.R. 639 and to discuss the issue of judicial review for our nation's veterans

The Congress of the United States, largely due to the work of this Committee, has provided a strong system of benefits for our nation's veterans. These benefits represent a fundamental right for our veterans. But there is no right without a remedy. And current law provides no true remedy for a veteran who feels his rights have been violated.

A veteran should be able to go to an unbiased third party for an impartial review of any adverse bureaucratic decision. But this is not available to our veterans.

Right now, a veteran is virtually helpless if the Veterans Administration makes an adverse decision regarding his rights or benefits. The only appeal he can make is to the office that made the decision in the first place. Obviously, the chance of a reversal in these circumstances is extremely slim. Three our of every four appeals of VA decisions are denied, and it is no wonder. The reality is that our veterans have no true right of appeal.

This violates not only the trust between this nation and our veterans but also the principle of judicial review of bureaucratic decisions that applies virtually across the board for other groups and is a cornerstone of our judicial system. Ironically, we deny a fundamental right belonging to all Americans to those who have fought and sacrificed to protect all of our rights.

The basic principle of H.R. 639, of which I am a cosponsor, is that judicial review of decisions by the Veterans Administration ought to be available to our veterans. I believe that it addresses this serious imbalance in the relationship between our nation's veterans and the federal government.

H.R. 639 does not provide an unusual right or benefit. The right of judicial appeal is a right afforded to Social Security recipients, to undocumented aliens, and to prisoners, but it is denied to the men and women who have served this country in uniform.

Today, veterans simply have no remedy. Current law stipulates that a veteran's claim for benefits is decided only by the VA. No veteran's claim may be brought before a federal court for adjudication.

In addition, current law places a $10 limit on the amount a veteran may pay for a lawyer's services in his claims appeal with the VA. This provision, enacted in 1862, makes it virtually impossible for a veteran to obtain the help of an attorney.

The time has come to treat our veterans fairly. We ought to give them the right to take their claims and appeals to the courts. H.R. 639 would give them that right. In addition, it provides for reasonable attorney fees so that a veteran has a fair opportunity to obtain legal counsel. I know other judicial review bills are pending in the House and Senate, my hope would be that you would build on these bills a proposal to provide full rights to veterans. It must allow review of individual cases. It must allow suits to be filed in U.S. District Courts making an appeal more accessible to our nation's veterans who live in every corner of the United States.

There are some concerns about this bill among veterans which have been related to me by veterans in my own District. First is the concern that the bill might open up a floodgate that could swamp the VA and bury it in litigation. The second concern is that, despite the limitations in the legislation, the removal of the $10 ceiling on lawyers fees might actually prevent many veterans from retaining legal counsel. I believe these questions can be addressed in legislation that provides sufficient safeguards against outrageous attorney's fees and setting requirements for appeal to avoid unfounded litigation. But the fact that appeals will be heard is no valid reason to deny veterans their fundamental rights.

One of our nation's first priorities is to ensure that our veterans get the fair treatment they deserve. The time has come to give this nation's veterans a right which most other Americans possess, the right to judicial review. I hope the Committee will move swiftly to bring this legislation before the House.

Judicial Review for Veterans

Written Statement of Representative John Bryant
Before the Committee on Veteran's Affairs

September 8, 1988

Mr. Chairman, due to the long list of well-qualified witnesses testifying before the Veteran's Affairs Committee today, I respectfully submit my brief statement in strong support of judicial review for the Veteran's Administration.

As a Texas member of the U.S. House Veteran's Affairs Committee, I have been committed to insuring veterans the same rights they fought to protect.

As a lawyer who believes in the right of every citizen to due process under the law, I support H.R. 639, which I have co-sponsored, to provide American veterans with a right all other U.S. citizens take for granted--access to appeal to a court of law disputes with federal agencies.

Veterans must be allowed their day in court. Social Security recipients, undocumented immigrant workers, and even federal prisoners can challenge federal agency decisions in court. In sharp contrast, a decision by the Veteran's Administration's Board of Veteran's Appeals to reject a veteran's claim for compensation is final, the veteran--a person who has been willing to risk life for country--having no chance for outside review.

Further, the anachronistic statute passed during the Civil War limiting a veteran's attorney's fees to $10 severely restricts the veteran's constitutional right to due process. Ten dollors would not pay for ten minutes of most lawyers' time.

The U.S. Senate in each of the past three years has passed judicial review legislation, including the bi-partisan S.11 approved ed on July 11, 1988. In addition, The Honorable Jack Brooks, distinguished Dean of the Texas Delegation and Chairman of the House Committee on Government Operations, recently submitted a report on behalf of his Committee recommending to the Speaker that Congress "pass legislation allowing veterans the right to judicial review and increase the ceiling on the limitation of fees for attorneys representing veterans in matters pertaining to the Veteran's Administration."

The Committee on Government Operations is authorized to "review and study, on a continuing basis, the operation of Government activities at all levels with a view to determining their economy and efficiency." The Committee assigned this responsibility, as it pertained to the VA, to the Human Resources and Intergovernmental Relations Subcommittee. Consequently, the subcommittee conducted an oversight investigation of the management of the VA's Department of Veterans Benefits (DVB) and the Board of Veterans Appeals (BVA).

The review focused on disability benefits, which represent an $11 billion annual outlay to 2.5 million veterans, their widows, and children. According to the report:

> "In fiscal year 1987, the Compensation and Pension Service (CPS) received 3,506,762 claims for benefits, completed 3,203,304 claims, disallowed 124,788 claims, and had 485,305 cases pending.
>
> During the same year, the BVA received 41,491 appeals of denied claims. Of these, 65.1 percent of the cases were denied, 12.8 percent of the cases were allowed, 20.7 percent were remanded for further review, and 1.4 percent were withdrawn or otherwise not considered.
>
> . . . In the last 10 years, the number of adjudicators decreased from 6,004 to 3,549, a loss of 41 percent of the division's positions. While the staff has decreased, the number of claims has increased, from 1,048,067 in 1984 to 3,506,762 in 1987."

Under the circumstances, I do not blame the VA for making mistakes. Mistakes are inevitable. I am, however, upset with the finding that:

A. "The VA has understated the actual number of errors found in its claims processing programs and has provided misleading data to Congress regarding the number of errors."

B. "Favoritism, undue emphasis on production quotas, and the failure to consider all medical evidence in some cases, have hampered the Board of Veteran's Appeals from always operating in the best interests of veterans seeking reconsideration of claim denials."

C. "The VA has discouraged agency employees who have attempted to expose unjust treatment of veterans seeking benefits."

Clearly the question is no longer just whether or not judicial review is needed--it is--but what form it should take. The fact that this hearing encompasses four bills reflects the wide-spread controversy about this subject. Nevertheless, we must all remember that the United States was founded on the premise of freedom through a system of independent checks and balances. The creators of our constitution realized the dangers of unchecked governmental authority--the executive, legislative and judicial.

I have co-sponsored H.R. 639 which provides for what I believe is an appropriate separation of powers, as does S.11. The other bills, H.R. 5039 and S.2292, I fear, do not. H.R. 639, however, goes beyond S.11, and, in my opinion, is the only bill that truly allows every veteran the right to an impartial appeal.

H.R. 639 would determine whether or not factual decisions are "arbitrary and capricious." The language in S.11 would permit courts to set aside a fact only where it was "so utterly lacking in rational basis." The Senate's language would ultimately give few veterans appeals a real opportunity to reach a federal court.

Finally, meaningful judicial review can only be realized if claimants have access to the closest federal court. S.11 provides for judicial review only in courts of appeals which, for most claimants seeking veteran benefits, would be a prohibitive burden due to transportation costs. The language of H.R. 639 is again preferable because it provides review in the district courts.

H.R. 639 would simply give veterans, who have given so much to our country, the same right enjoyed by the VA. Proponents of the existing VA claims process contend that judicial review and attorney representation would transform an informal system into an adversarial one and overburden the judiciary. I wonder if they realize that the VA has sued over a quarter of a million veterans within the last eight years--mostly to recoup overpayments of veterans benefits.

Let's give America's veterans and their families a fighting chance. Support H.R. 639.

OPENING STATEMENT OF

REP. JAMES J. FLORIO (D--NJ)

BEFORE THE VETERANS' AFFAIRS COMMITTEE HEARING

ON JUDICIAL REVIEW

SEPTEMBER 8, 1988

Mr. Chairman, I would like to thank you for agreeing to hold this hearing on an issue that is very important to the veteran community and for also setting a markup for judicial review legislation for next week. It is important that we act to guarantee that veterans will have the same rights as other citizens of this nation. The time has come to act.

Mr. Chairman, as you know, I have long held the belief that the Veterans Administration is no different from any other agency of our government, in terms of accountability. In order to guarantee that accountability, our Constitution clearly defined the role of the three branches of our government and provided for court review of actions by the other two branches. With this right comes the right that any individual citizen has to go to court and seek a review.

One would think that our veterans -- who have given so much to this country -- would have the right, when the VA gives them an unsatisfactory decision to go to court. Any other citizen has that right. Well, it doesn't work that way because a veteran does not have that privilege.

Not only is the veteran limited to pursuing a case within the VA, but that veteran can only pay an attorney up to ten dollars to represent him. I don't know of too many attorneys who will take a case for ten bucks.

As things stand, the last place a veteran can go if the VA turns him down on a claim is the Board of Veterans' Appeals. This is the same Board that has an error rate of up to 8.4 percent on substantive matters, 18.2 percent on judgmental matters and 21.5 percent on procedural matters.

This is the same Board that denied 72 percent of the cases in 1980 and 65 percent of the cases in 1987. This is the same Board that has a quota system to complete 40 cases per week in order to get a 5 percent salary bonus. It is the same Board that had some of its members deciding one case every 8 minutes. This is not the justice our veterans deserve.

Recently, the Government Affairs Committee issued a report recommending that the veteran be given the right of judicial review. The Senate has also approved legislation, S. 11, also giving veterans the right of judicial review. It is time we joined in also approving judicial review.

I also want to clarify to the committee and those here that of the 4 bills before us today, only 2 offer judicial review. These are H.R. 639 and S.11. The other two proposals, though well-meaning, do not offer judicial review to the individual veteran.

I also want to share with the committee my personal experience in speaking to the veterans of New Jersey about this issue over the years. I have been struck by the wide support judicial review has received in my state -- the New Jersey State DAV (Disabled American Vets) this summer approved a resolution supporting judicial review. Members of the NJ VFW have also indicated to me their support of judicial review. And yet, both the national DAV and VFW are here in opposition to judicial review. In addition, in the last two weeks, my office received a number of calls from New Jersey members of the DAV. After each bill had been explained to these callers, there was not one caller who opposed judicial review!

Again, I look forward to hearing the testimony today and to working with the Chairman and members of this committee to approve a genuine judicial review package.

Thank you.

PREPARED STATEMENT

OF

HONORABLE MORRIS S. ARNOLD

and

HONORABLE STEPHEN G. BREYER

ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

ON

H.R. 639 - VETERANS' ADMINISTRATION
ADJUDICATION PROCEDURE AND
JUDICIAL REVIEW ACT,

H.R. 5039 - VETERANS' REASSURANCE ACT OF 1988,

S. 11 - VETERANS' ADMINISTRATION
ADJUDICATION PROCEDURE AND
JUDICIAL REVIEW ACT

and

S. 2292 - VETERANS' JUDICIAL REVIEW ACT

SEPTEMBER 8, 1988

Mr. Chairman and Members of the Committee, I am Judge Morris S. Arnold of the United States District Court for the Western District of Arkansas. I appear before you today in my capacity as a member of the Committee on Federal-State Jurisdiction of the Judicial Conference of the United States. Although he could not accompany me today, I am joined in this statement by Judge Stephen G. Breyer of the United States Court of Appeals for the First Circuit and Judicial Conference representative to the Administrative Conference of the United States. Judge Breyer formerly served as Special Counsel of the Senate Judiciary Subcommittee on Administrative Practice and as Chief Counsel of the Senate Judiciary Committee. He also was a professor at Harvard Law School, spending 3 years as a professor at the Kennedy School of Government. Judge Breyer has also written extensively in the field of Administrative Law. I am accompanied by Christy Massie, Counsel to the Legislative and Public Affairs Office of the Administrative Office of the United States Courts. We appreciate the opportunity to appear before the Committee on Veterans Affairs to present the views of the Judicial Conference of the United States on H.R. 639 and S. 11, which provide, among other things, for judicial review of veterans' claims for benefits and H.R. 5039 and S. 2292, which provide for judicial review in the United States Courts of Appeals of Veterans' Administration regulations and regulatory processes only.

The Judicial Conference opposes Judicial branch review of veterans' claims for benefits as contained in H.R. 639 and S. 11. If Congress deems review of veterans' claims to be absolutely necessary, then we suggest that such review remain with the Board of Veterans Appeals or be conferred upon a new Article I Executive Branch court. Judicial review should be limited to the review of constitutional issues and statutory interpretations, as is contemplated in H.R. 5039 and S. 2292. Appellate-type review could be had either in the district court on the limited basis of reviewing the record, as is done in Social Security cases, or in the court of appeals, as contained in H.R. 5039 and S. 2292. The Judicial Conference will oppose any provision requiring judicial review of any factual determination of the Veterans Administration.

These views are certainly not intended to disparage the rights of veterans. The objections of the Judicial Conference to the proposed bills are purely practical. However, we do not believe that H.R. 639 and S. 11 are the most appropriate or only available responses to any problems encountered by veterans. These bills will not significantly help veterans and will pose obstacles to the efficient functioning of the government. Our objections are not based or phrased in terms of a "right to go to court", but rather on whether an Article III court is the best or only institution to solve any such problems, if indeed there are problems. Whether the present system is inadequate or problematic is a policy matter for the Congress to decide. We, therefore, defer to Congress on that matter. We do suggest, however, that, if Congress perceives a problem, that there are more appropriate responses than H.R. 639 and S. 11 and that the most appropriate solution does not involve the judicial branch. If the Committee concludes otherwise, we can only support the compromise solutions of S. 2292, H.R. or 5039, or the amendment we have attached as Appendix A, which we prefer to any of the proposed bills.

Prior to this Congress, the debate on judicial review of veterans' claims for benefits has been limited simply to whether or not veterans' claims for benefits should receive judicial review, with the answer consistently framed in either the affirmative for Article III review or the negative against Article III review. Little consideration has been given to other possible answers, nor, until this Congress, has any effort been directed toward providing any type of compromise solution, such as S. 2292 or H.R. 5039.

In the late 1800's, Congress was of another mind. Congress perceived at the time that factual questions were not susceptible to judicial standardization and that any decisions made by the courts in such matters took a great deal of time and expense. Congress then began to create a series of administrative agencies primarily to avoid the burdens on the courts and litigants associated with cost and delay and to insure that any decisions would be adequately and uniformly made. In other words, Congress believed the courts were not equipped to perform these functions very well. The Supreme Court recognized these same problems in relation to judicial review of veterans claims for benefits in Johnson v. Robinson, 415 U.S. 361, 370 (1973), in upholding the non-review clause.

Thus we have come full circle with what some now perceive as a need to put veterans' claims for benefits into the courts. However, any such litigation would still be time-consuming and expensive, not only to the courts but also to the veteran; and such review would still lack uniformity. By placing such factual determinations back into the courts, Congress would be attempting a solution to one possible problem by creating another problem which a previous Congress had addressed by removing such determinations from the courts. If Congress felt the courts could not adequately handle such decisions then, they certainly could not believe so now, one hundred years later, with a judiciary which is nine times larger than it was in 1988, with issues which are much more complex and with the greatly increased size of the veteran population. Therefore, since it appears that neither of the previous solutions has been successful, it is incumbent upon us to suggest that another alternative or compromise be found.

If Congress feels that a solution must be found quickly, then the approaches of S. 2292 or H.R. 5039 do point in the correct direction. Such approaches remove the need for factual determinations and confines judicial review cases to questions of interpretation of statutory and constitutional law. This is a fundamental duty which the courts will always perform, regardless of the burden. Attached as Appendix A is an amendment to H.R. 639 which would provide for judicial review of questions of constitutional and statutory law. If there is a need to move quickly, then we suggest this approach.

In addition to S. 2292, and H.R. 5039, there are other meritorious approaches which have not been fully explored or examined. We urge Congress to find the best solution, not just the quickest solution. We suggest that Congress commission a study of all approaches, including H.R. 639, S. 11, H.R. 5039 and S. 2292, with a report to be filed with Congress on a date certain. By whom and how the study is to be conducted is, of course, a matter for Congress to decide. Representatives of the Judicial Branch will be available to provide any expertise or assistance that Congress may require.

The Judicial Conference of the United States

Most often, requests for comments on legislation affecting the federal courts are made by the House and Senate Judiciary Committees, which have principal legislative and oversight authority for the Judicial Branch of government. Those Committees are familiar with the role of the Judicial Conference within the Judicial Branch of government. I note that three members of this Committee are also on the House Judiciary Committee (Representatives Edwards, Staggers and Bryant). However, since this committee seldom deals with judicial matters, perhaps a brief explanation of the role of the Judicial Conference is in order.

Under section 331 of Title 28, United States Code, the Judicial Conference of the United States is the policy-making body for the administration of the United States Courts. While the structure of the federal courts is well-known -- the district (trial) courts, the courts of appeals, and the Supreme Court of the United States -- the structural arrangement for the administration of the Judicial Branch is not so familiar. The Judicial Conference, chaired by the Chief Justice of the United States, is composed of the chief judges of the circuit courts of appeals and one district judge from each of the regional circuits. In addition, the chief judges of the Court of Appeals for the Federal Circuit and the Court of International Trade are also members. Accordingly, the Conference is composed of twenty-six judges from around the country, who represent each level of the Judicial Branch. As members of the Judicial Conference, they serve as administrators and formulators of policy, not as members of a judicial tribunal. The Judicial Conference establishes administrative policy for the court system and makes recommendations to Congress concerning changes in law that impact upon the judiciary's ability to serve the public efficiently and economically.

The Judicial Conference utilizes a committee structure, not unlike that of Congress, to consider administrative problems and policies and to evaluate legislation in response to Congressional requests. Both the present membership of the Conference and the present committee structure are presented in Appendix B to this statement. The Conference considers numerous legislative proposals each year and recommends what the members believe to be the best approaches to be taken with regard to organization, jurisdiction, procedure and administration of the federal judiciary.

Judicial Review of Veterans' Claims for Benefits

The Judicial Conference anticipates that the one central problem for the Judicial Branch in the immediate years ahead will be an exhaustion of our ability to rearrange or reprogram available resources to keep pace with increasing Judicial Branch responsibilities. The Judicial Branch is already experiencing steady growth and sequential change as a direct consequence of both increasing demands for judicial service and legislative actions. Some of the legislation was designed to help us, but some was enacted without recognition of the consequences -- such as the ever-increasing authorization of judicial review without reference to any uniform policy as to type of cases reviewed. Such is the case with judicial review of administrative actions.

Judicial review of administrative actions has been addressed by Congress in reaction to a specific problem in a particular agency on a case-by-case basis in many different committees. The result has been a patchwork of different approaches to the same problem: How best to provide government-administered benefits for those eligible with protections against arbitrary administrative actions. Levels of review range from internal review within the agency to seven levels of review in social security cases: (1) to the supervisor, if the intake officer refuses to review; (2) to an administrative law judge; (3) to the Social Security Board of Appeals; (4) to the United States district court for the attention of a United States magistrate; (5) to a United States district judge for the review of the magistrate's disposition; (6) to a United States court of appeals; (7) to the United States Supreme Court. Perhaps a better approach might be to place such proposals before or consult with the respective Judiciary Committees in order to formulate a uniform policy of judicial review for all administrative actions. We understand that the House Judiciary Subcommittee on Administrative Law and Governmental Relations has expressed some concern in this area, especially in relation to creation of a corps of administrative law judges.

The specific question of vesting jurisdiction in the United States courts for reviewing cases involving the provision of veterans' benefits has been discussed for many years by the Judicial Conference. Throughout the discussion, the answer consistently given the question has been in the negative. Many, including the Veterans Administration, have argued that to provide an adversarial method of decision-making beyond the Board of Veterans Appeals would drive a wedge between the Veterans Administration and the men and women they serve. This may or may not be so. We will defer to more qualified opinions on that matter. The concerns of the Judicial Conference are limited to the administration of the adversary process under the Constitution and statutes of the United States. Our business is case-by-case adjudication of individual rights, not the routine internal administration of agencies of the Executive Branch of government. We firmly believe that internal policy matters concerning Executive Branch administration are not within the province of the Judiciary.

Our first concern is, of course, limited to whether the federal court system can effectively handle the caseload that would be created by H.R. 639 and S. 11, which are currently before this Committee. Litigation has become not only frustrating, but expensive and frequently unrewarding. Thus the question becomes, to what avail is it to expand judicial review to government-administered benefit programs when the expense and delay involved effectively prohibit the needy from obtaining relief? Judicial review in such a case would favor only the wealthiest and most aggressive of those seeking benefits.

Twenty-five years ago, in 1963, the Judicial Conference initially disapproved of legislation to provide for the judicial review of decisions of the Administrator in relation to veterans' claims for benefits by the United States District Courts. The Conference then recommended that this review be vested in a special Executive Branch tribunal. Conf. Rept. March, 1963, p. 18. This position was reaffirmed by the Conference in 1978. Conf. Rept. March, 1978, p. 9. Constantly increasing caseloads in district courts and courts of appeals, and our belief that it was not practical or desirable to impose additional case filings of veterans' appeals upon district courts and courts of appeals, reaffirmed our position that the ultimate review of veterans' claims should remain exclusively with the Board of Veterans Appeals or be conferred upon a new Executive Branch Article I court. Conf. Rept. September, 1981, p. 65 and September, 1982, p. 65. In addition, the Conference noted that imposition of such a caseload on district courts would inevitably have a consequential impact upon the courts of appeals and, ultimately, upon the Supreme Court.

A pattern of consistently increasing judicial workloads during the past twenty years has continually required the Judicial Conference to rearrange or reprogram resources in order to respond to demands for basic services. Delays in the creation of needed authorized judgeships and in the filling of vacancies in currently authorized judgeships, and a series of meritorious new demands upon managerial procedures, such as Speedy Trial Act, Pretrial Service Act and Sentencing Reform Act requirements, have aggravated existing systemic congestion. In addition, since 1984, Congress has strengthened law enforcement efforts at the Federal level with, among others, the enactment of the Comprehensive Crime Control Act, including Sentencing Reform, and the Anti-Drug Abuse Act. While new judgeships, the filling of vacancies and larger appropriations, even if timely provided, would not have solved all resulting problems, the delays in availability of new judgeships and appropriations to fund needed supporting personnel have continually kept the Judiciary in the posture of "racing to catch up" with demands for services.

At this point we should note that increases in the size of the federal judicial system have not necessarily paralleled increased workloads in the courts. Every two years the Judicial Conference surveys the need for additional district and circuit judgeships based on the current workload of the courts and corresponding manpower needs. In response to our biennial surveys of 1980 and 1982, Congress in July of 1984 enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 (P. L. 98-353), which authorized 85 new federal judgeships to address our 1980 needs.

After passage of the Act -- and taking into account the 85 new judgeships authorized in the Bankruptcy Amendments and Federal Judgeships Act of 1984 -- the Judiciary conducted the 1984 biennial survey. As a result, at its September meeting 1984, the Judicial Conference recommended 5 additional circuit judgeships, 26 permanent district judgeships and 16 temporary district judgeships based on the 1984 workload of the courts and the corresponding manpower needs. In 1986 the Judiciary conducted another biennial survey. As a result, at its September meeting in 1986, the Judicial Conference recommended 13 additional circuit court judgeships, 40 permanent district judgeships and 16 temporary judgeships based on the 1986 workload of the courts. Our 1984 and 1986 judgeship needs have yet to be addressed by Congress. The Judiciary is currently conducting the 1988 biennial survey; and, therefore, this year our judgeship needs will lag eight years behind our workload requirements. This is, of course, aggravated by a number of judicial vacancies which have yet to be filled.

The documented "litigation explosion" in federal trial courts, with its derivative impact upon the Courts of Appeals and the Supreme Court of the United States, has been expensive. In 1966 the Federal Judicial Budget was $80.5 million; in 1986, it was $1 billion and in 1988, it is $1.3 billion. We have requested a supplemental for 1988 of $56.7 million and a fiscal year appropriation for 1989 of $1.7 billion. If the amounts requested for the 1988 supplemental and for fiscal year 1989 are not approved, we estimate that we will have no choice but to:

- Defer the completion of bankruptcy judges' facilities which will reduce the efficiency of the courts to handle the significant increases in bankruptcy case filings.
- Defer the appointment of new magistrates and conversion of part-time magistrates to full-time status, as authorized by the Judicial Conference, which will add to the growing pending caseload in the Federal courts.
- Reduce staffing level in the clerks' offices of the courts of appeals, district courts and bankruptcy courts to 86 percent of the formula allowance established by the Judicial Conference. This staffing level will require reducing the number of hours per day the public and Bar will have access to the clerks' offices.

- Reduce staffing level for probation and pretrial services to 78 percent of the formula allowance, which will result in curtailment in the supervision of probationers and parolees and limit pretrial services to only serious felony cases. The impact is greatly exacerbated by the additional duties imposed on probation officers as a result of the new sentencing guidelines effective November 1, 1987.
- Be unable to appoint counsel in approximately 9,800 public defender cases. This may lead to litigation regarding Constitutional issues.
- Defer civil jury trials for a period of approximately 50 days, which may also lead to litigation.
- Curtail the Drug Dependent Offenders Program, which would be counterproductive in that defendants eligible for release under the program would remain incarcerated at substantially greater cost to the taxpayers.
- Abandon court facilities at statutory places of holding court to reduce charges for the rental of space.

- Freeze the current level of court security and defer replacing obsolete security systems, which would make the judges vulnerable and possibly the targets of violence and intimidation during this period of increased worldwide terrorist activity.

Therefore, we request that Congress not enact any legislation creating new causes of action, services, or duties or expanding federal jurisdiction without a plan to increase judicial resources or adjust jurisdictional arrangements.

As retired Chief Justice Burger has stated: "A form of mass neurosis leads many people to think courts were created to solve all the problems of mankind. We must learn from the experience of labor and management that courts are not the best places to resolve certain kinds of claims."* The Judicial Conference has recognized that increasing resources alone is not a complete answer to workload increases, and has repeatedly recommended adjustments in jurisdictional arrangements as an alternative remedial action. Reserving federal trial and appellate courts for matters vital to our national interest that only they can resolve is more necessary today than at any previous point in history. The Conference has continually recommended abolition of diversity jurisdiction and creation of Article I Executive Branch tribunals, modeled after the Tax Court, for review of benefit claims cases. It has also endorsed a range of alternative dispute resolution techniques, such as arbitration and mediation.

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*Remarks of Warren E. Burger, Chief Justice of the United States, Twin Cities Advisory Council of the American Arbitration Associatin (August 21, 1985).

Nevertheless, year after year Congress has statutorily expanded federal jurisdiction. In every Congress for the past twelve years, proposals have been introduced to expand federal jurisdiction, many have been enacted, and almost no consideration has been accorded the workload consequences for the federal court system. The influx of veterans' benefit cases into the federal court system, as contemplated in H.R. 639 and S. 11, can not be accommodated without sacrificing services to the American public. In fact, we estimate that, should either of these proposals be enacted, we would have to increase the number of judgeships that we will be requesting as a result of the 1988 biennial survey, an increase above and beyond the biennial survey results.

Under H.R. 639 and with the current Board of Veterans Appeals (BVA) remaining at 65 members, the BVA expects to decide 32,500 cases per year, of which they estimate denying 70% (or 22,750). Of that number, approximately 20% will be appealed to the district courts or 4,550 cases. This increase in district court caseload, on the limited basis of reviewing the record with no need to remand for expansion of the record, would require the equivalent of 11 additional judgeships and 49 deputy clerks at a first year cost of $8.1 million, and $6.1 million in succeeding years (no additive for inflation). With additional members, BVA estimates it may handle as many as 46,000 cases per year, thus 6,440 cases per year may ultimately be brought before the district courts. This would require authorizing the equivalent of an additional 16 judgeships and 70 deputy clerks, at a cost of $11.8 million the first year and $8.9 million per year thereafter, again assuming review on the limited basis of reviewing the record with no need to remand for expansion of the record. The cost to the Judiciary of establishing a new district judgeship is attached at Appendix C. If any factual determinations by the court or numerous remands to the Administrator are required, then the number of required judgeships and clerks and the cost could easily triple.

It can be anticipated that roughly 5% to 6% of total VA claim filings at the district court level will ultimately be brought before a Court of Appeals. This estimate is based solely upon statistics gathered from the appeals of Social Security cases over the past seven years (1981-1987), which are attached as Appendix D. Thus, nationwide the appeals courts could expect between 250 and 335 VA case filings per year, depending upon expansion of the 65-member BVA. This number of cases could require the establishment of the equivalent of 2 additional circuit judges at a cost of $1.4 million the first year and $1.1 million annually thereafter.

The cost to the Judiciary of establishing a new circuit judgeship is attached at Appendix E.

In addition, since there is no statute of limitations on the reopening of claims for the introduction of new and material evidence and for good cause shown, many claims previously denied could be reopened due to the advent of judicial review. This large number of cases would pose a burden on the Judiciary since each judge would normally be expected to hear and decide approximately 400 cases per year. If past is prologue, it may be years before stresses created by providing judicial review can possibly be accommodated. The provision for reopening of claims with no statute of limitations alone would assure that a glut of cases will be filed in the first six months, when the courts would be the least experienced in handling such matters.

S. 11 places judicial review in the courts of appeals. The courts of appeals are certainly in no better position than the district courts to handle this caseload in terms of workload and the availability of judges. In fact, in the courts of appeals, each case requires a three-judge panel, not just one judge sitting as a trial judge. Under S. 11, there would be no increase in the district court caseload and, correspondingly, no district court judgeship increase required. However, the increased workload for the courts of appeals would require a staggering increase in circuit judgeships because they sit in three-judge panels. In addition, a circuit judgeship is much more expensive as illustrated in Appendix E. So placing judicial review of veterans' claims for benefits in the courts of appeals certainly would be more expensive than placing it in the district courts.

Under S. 11 with the current Board of Veterans Appeals (BVA) remaining at 65 members and using the same calculations for number of cases as used above, the increase in the courts of appeals caseload, on the limited basis of reviewing the record with no need to remand for expansion of the record, would require the equivalent of 30 additional circuit judgeships and 61 deputy clerks at a first year cost of $22 million, and $17 million in succeeding years (no additive for inflation). With additional members, on the BVA, the increase would require authorizing the equivalent of an additional 40 circuit judgeships and 80 deputy clerks, at a cost of $29 million the first year and $23 million per year thereafter, again assuming review on the limited basis of reviewing the record with no need to remand for expansion of the record. If any factual determinations by the court or numerous remands to the Administrator are required, then the number of required judgeships and clerks and the cost could again easily triple.

Because this bill includes a provision to allow for court of appeals filing of cases decided by BVA on or after April 1, 1987, we would expect an initial glut of these "older" cases, probably within the first year of the bill's enactment. BVA estimates that there will have been denials during the period, and approximately 10% of these, or 2,275 cases, will be brought into United States courts of appeals. The retroactive effective date and the provisions for reopening of claims with no statute of limitations, coupled with the advent of judicial review as contemplated in S. 11, will undoubtedly also increase the burdens on the court at a time when such burdens can not be accommodated.

Let me now turn to substantive, non-workload related reasons for our objections to broad authorization of judicial review of veterans claims in the Judicial Branch. The Supreme Court recognized the central problems in providing for judicial review of veterans' claims for benefits in Johnson v. Robinson, 415 U.S. 361 (1973) at 370, by explaining the purposes behind the non-review clause:

1) to insure that veterans' benefit claims will not burden the courts and the Veterans' Administration with expensive and time-consuming litigation.
2) to insure that technical and complex determinations and applications of Veterans' Administration policy connected with veterans' benefits decisions will be adequately and uniformly made. (Emphasis added).

Any such litigation in the courts would be expensive and fraught with delay. The experience with social security cases is illustrative. Because of the large numbers of criminal cases and others that have priority, the social security cases move very slowly through the court system, and it is not unusual to find an appeal in the court of appeals involving a claim filed five or more years prior to submission of the appeal to a three-judge panel. This delay is extremely undesirable. However, because of the heavy caseload of the courts, such delay is inevitable.

We, therefore, believe that, if Judicial Branch review is deemed desirable by Congress, then judicial review should be limited to the review of constitutional issues and questions of statutory interpretation, as contemplated in the amendment attached as Appendix A. As stated earlier, that fundamental duty is one the courts will always perform, regardless of the burden. The Judicial Conference recommends, however, that legislation not be enacted which would impose upon the district courts or courts of appeals repetitive review of factual questions concerning provision of veterans' benefits. The provision of judicial review of any factual determinations of the Veterans Administration would pose a substantial new burden for the district courts or the courts of appeals and at the same time would undermine the fact-finding process within the Veterans Administration.

The courts are not well equipped to determine such factual issues as whether or not an injury is service-connected or to determine other medical or technical questions, which are of a type the Veterans Administration confronts all of the time uniformly. In most social security cases, four judges and a United States magistrate are required to review the same record for factual error after it has received administrative review at a high level. The typical record in a social security disability case consists primarily of medical evidence of a technical nature. A conscientious judge called upon to review such a record cannot make a decision without informing himself or herself fully with respect to the medical issues. It would appear that cases involving claims for benefits before the Veterans Administration would be quite similar to disability claims under the Social Security Act. With rare exceptions, cases involving social security disability present only factual issues for determination and it would appear that the same would be true of cases involving claims before the Veterans Administration. A specialized Article I tribunal would quickly acquire expertise in the subject matter of benefits' appeals and should be able to make decisions more quickly and on the basis of a better understanding of the record than a court of general jurisdiction.

In addition, factual questions are not susceptible to judicial standardization. Thus, the decisions of the federal courts in those matters would inevitably lack uniformity. Persons with similar claims against one federal agency could receive different results depending on where they file their claim for judicial review. This in turn could cause the

Veterans Administration to treat those who seek benefits differently, depending upon the region of the country in which a claim is filed. This would certainly not seem fair. Although the Supreme Court can resolve such conflicts, the workload of the Court already precludes granting certiorari to resolve all existing conflicts between the circuits, and the Court could not realistically use the writ of certiorari to resolve inconsistent factual questions between circuits. Although H.R. 639 and S. 11 require that a finding of material fact be set aside only when "it is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result", much litigation will be engendered as to the exact meaning of this standard and as to whether the finding of material fact alleged meets this standard.

If appellate review is to be authorized, we prefer that it be based upon the same procedures and venue as presently provided for review of decisions of the United States Tax Court. See section 7481 of the Internal Revenue Code. In this manner, any factual determinations of the Veterans Administration would be accorded proper finality. Only questions of interpretation of statutory and constitutional law would be subject to review.

You may wonder whether it would be advantageous to place judicial review of veterans' claims for benefits in the courts of appeals, as is contemplated by S. 11. If you mean simply to substitute the courts of appeals for the district courts as was done in S. 11, we would still be opposed to such judicial review. Although the courts of appeals are more accustomed to record review, reviewing a record for factual determination would be no easier in the courts of appeals than in the district court.

We must point out that courts of appeals are not set up to make findings of fact in relation to benefits or attorneys' fees. It is impractical for courts of appeals to resolve contested issues of this sort, as these courts lack procedures for hearings related to fact-finding. They are accustomed to the procedures of appellate review, which usually involve only oral argument on disputed issues of law. In addition, such review would still remain time-consuming, expensive and would still lack uniformity. The courts of appeals could not handle the caseload any better than the district courts, unless the review were by writ of certiorari as opposed to mandatory review. If, however, judicial review consisted of only constitutional issues and statutory interpretation in the courts of appeals as is contemplated in the amendment attached as Appendix A, we would have no objection.

On April 18, Senator Murkowski introduced S. 2292, the Veterans' Judicial Review Act. This bill provides for review of the Veterans' Administration rules and regulations in the courts of appeals. We believe this approach is preferable to

H.R. 639 and S. 11. This approach removes the need for factual determinations and confines the review to questions of interpretation of statutory and constitutional law.

In addition, section 5(b)(4) provides that when the BVA rules that a regulation of the Veterans' Administration is invalid, the Administrator may petition for review to the U. S. Court of Appeals for the Federal Circuit. Chief Judge Howard T. Markey of the U. S. Court of Appeals for the Federal Circuit, speaking for the court, has stated that the court has no objections to this provision. He anticipates only a few cases arising under this section, but cautions that, if there are a significant number of cases, he may require additional resources to handle these cases and others which may arise under the Childhood Vaccine Injury Act, involving the review of compensation granted to children injured by inoculations, which took effect recently. As to other provisions in the bill, we will, of course, have no comment on those portions having to do with the internal administration of the Veterans' Administration as they are matters of policy between the Executive and Legislative Branches.

Growth and development in the Federal Judicial Branch has not been the singular province of the House and Senate Judiciary Committees for many years. The result has been an unstructured -- and often contradictory -- growth in the jurisdiction of the federal courts. Proposals for the creation of Article I Executive Branch courts to review Social Security cases, immigration cases and other governmental benefits have acknowledged the panoply of inconsistent standards for judicial review of agency actions and have manifested an effort to fashion a more uniform policy approach to wisely "spending" Judicial Branch resources. For the branch of government that is principally devoted to the adjudication of cases and controversies involving fundamental rights, inconsistency and contradiction in law are major impediments to efficiency and economy. We must suggest to you, as we have innumerable times to others, that the lack of a unified policy for judicial review is a great source of inconvenience and concern -- not only to judges, but to the litigants, attorneys, and members of the Judiciary and Appropriations Committees of Congress.

The Judicial Conference opposes a sweeping authorization for district court or court of appeals judicial review of veterans' claims as contemplated by H.R. 639 and S. 11. In the alternative, we suggest, if Congress determines that review is necessary, that such review remain with the Board of Veterans Appeals or be conferred upon a new Article I Executive Branch court. Judicial review should be limited to review of constitutional issues or statutory interpretations, as contemplated in H.R. 5039, S. 2292 and the amendment attached as Appendix A. Appellate review could be had either in the district court, as is done in Social Security cases, or in the court of appeals under jurisdictional and venue provisions similar to the review of the decisions of the United States Tax Court. Accordingly, we would have only technical objections to enactment of H.R. 5039, the Veterans' Reassurance Act, and S. 2292, the Veterans' Judicial Review Act, but would oppose enactment of H.R. 639 and S. 11, the Veterans' Administration Adjudication Procedure and Judicial Review Act.

Attorneys' Fees

A subsidiary issue that arises is the issue of whether attorneys' fees should be awarded. We, of course, take no position on the awarding of attorneys' fees, as this is a matter of policy for the Legislative and Executive Branches, especially in relation to those fees awarded during representation before the Veterans' Administration. However, we do express some concern about the taxation of attorneys' fees in general.

The general rule -- often referred to as the "American Rule" because American courts long ago departed from the common law of England in this respect -- is that each party is responsible for the payment of his or her own attorneys' fees. In short, while court costs may be taxable against the losing party, even the successful litigant will usually be required to absorb the costs of legal representation. Many bills that would now grant expanded jurisdiction to the

Federal courts also change this rule insofar as litigation arising under the particular statute is concerned.

The Judicial Conference has for many years cautioned against this piecemeal erosion of the American Rule. If the Congress wishes to change the scope of taxable costs and fees in federal court litigation, that change should be made as a fundamental change of policy, not implemented through piece-by-piece disintegration of the American Rule. Accordingly, we have suggested, on several occasions, that Congress review the entire question of taxation of attorneys' fees and establish a uniform policy.

Today the Equal Access to Justice Act, 28 U.S.C. 2412(d), provides that attorneys' fees may be awarded against the United States, if the court determines that the position asserted by the United States was not "substantially justified", to an individual with a net worth not exceeding $1,000,000 or an organization with a net worth not exceeding $5,000,000. Even with this general provision, there are substantial problems of interpretation, and substantial "satellite" litigation has arisen. First, the court must determine whether a party has "prevailed" against the United States. Second, the court must determine whether the position of the United States was "substantially justified". Third, the court must determine the net worth of the individual or organization in order to determine whether the individual or organization is eligible for attorneys' fees.

Thus, these provisions create a significant workload of their own.

The creation of a separate attorneys' fee award under a new grant of judicial review over veterans claims will create even more satellite litigation. The Veterans Administration is unable to estimate either the administrative or judicial costs. We are convinced, however, that there may well be substantial increased costs to the judicial system in terms of satellite litigation. Indeed, we may fairly speculate that, at the beginning at least, the possibility of an award of attorneys' fees will become an incentive to litigation -- particularly where there is no disincentive from the threat of an award of attorneys' fees against an unsuccessful plaintiff.

In addition, even if we assume that jurisdiction is provided in the district courts or courts of appeals, that a veteran is successful in a suit, that court costs will be automatically taxed, and that the veteran may apply for attorneys' fees, we are still not free to assume that he will emerge from the exercise as he anticipated he would. Historically, awards of attorneys' fees have been substantially less than the actual cost of counsel. Even a successful litigant who is awarded a reasonable attorney's fee will ultimately incur additional costs. How much those additional costs, including subsidiary non-taxable costs of the litigation, will actually reduce an award of veterans benefits is difficult to estimate for the average case, but we may fairly assume that even successful litigants seeking veterans benefits will complete the process with less than that which they expected.

Accordingly, we urge Congress to consider the question of awards of attorneys' fees on a much broader policy ground. We recommend a general rule, rather than continued piecemeal erosion of the American Rule that has guided the courts for so long.

Conclusion

The Judicial Conference of the United States does not recommend the authorization of comprehensive or broad judicial review of veterans' claims. A broad grant of judicial review will unnecessarily burden already overcrowded court dockets with repetitious review of factual determinations and necessitate a request for additional judgeships. The long-range solution is not to create more and more judgeships, even though they are needed right now. We must move toward taking a large volume of conflicts out of the courts, not putting new ones in the courts. Therefore, the Judicial Conference has continually favored the abolition of diversity of citizenship jurisdiction, the creation of Article I Executive Branch courts to review governmental benefit cases, and voluntary alternative dispute resolution techniques such as arbitration and mediation.

Money alone will not solve all of the Judiciary's problems, but limited resources in the short run do impair our ability to repeatedly respond to unanticipated changes, and we are definitely in a period of limited resources.

If Congress ultimately determines that Judicial Branch review is desirable, that review should be limited to questions involving constitutional and statutory interpretation. Any grant of judicial review places not only a caseload strain upon the courts but also must be considered in light of the overall theory of Judicial Branch review and the realities of economy and efficiency that influence resource allocation.

APPENDIX A

Amendment to H.R. 639

TITLE III -- JUDICIAL REVIEW

Sec. 301. Subsection (a) of section 211 is amended by striking out "sections 775, 784" and inserting in lieu thereof "sections 775 and 784 and chapter 72 of this title".

Sec. 302(a) Part V is amended by adding after chapter 71 the following new chapter:

"CHAPTER 72 -- JUDICIAL REVIEW

"Sec.
"4025. Jurisdiction.
"4026. Procedure.

"§ 4025. Jurisdiction

"(a) Notwithstanding section 211 of this title, after any final decision of the Administrator adverse to a claimant in a matter involving a claim for benefits under any law administered by the Veterans' Administration, such claimant may obtain review of such decision in a civil action subject to the provisions of subsection (b) of this section. Such action shall be commenced within sixty days after the mailing to the claimant of notice of such decision pursuant to section 4004 of this title and shall be brought against the Administrator in the court of appeals of the United States for the circuit in which the plaintiff resides or in the United States Court of Appeals for the District of Columbia (or the U. S. Court of Appeals for the Federal Circuit).

"(b) The courts of appeals of the United States shall have exclusive jurisdiction, in any civil action commenced under this section, to review any final decision or determination of the

Administrator to the extent that such action is based on a claim or cause of action which --

"(1) arises under the Constitution of the United States, or

"(2) constitutes a challenge to any regulation of the Administrator relating to the extent of its conformity to any applicable Federal statute or treaty or a challenge to the interpretation or application of a Federal statute or treaty.

"(c) Jurisdiction under this section is subject to a stipulation by the plaintiff and the defendant that --

"(1) there is no dispute as to the material facts of the case, and

"(2) a statutory or regulatory provision is the only bar to the alleged entitlement at issue in the case.

"(d) The judgment of the court of appeals shall be final, except that it shall be subject to review in the same manner as a judgment in other civil actions within the jurisdiction of courts of appeals of the United States.

"(e) Notwithstanding subsection (a) of this section, in any action in which the court of appeals has exclusive jurisdiction under this section, the Administrator may waive any requirement of exhaustion of administrative remedies.

"§ 4026. Procedure

"(a) As part of the answer in an action brought under section 4025 for the review of the decision in the court of appeals, the Administrator shall file a certified copy of the the record of the proceedings upon which the finding and decision complained of are based.

"(b) Any action instituted in accordance with this chapter shall survive notwithstanding any change in the person occupying the office of Administrator or any vacancy in any such office.

APPENDIX B

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September 1988

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OF THE UNITED STATES

September 1988

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APPENDIX C

COST TO THE JUDICIARY OF ESTABLISHING A NEW DISTRICT JUDGESHIP

Appropriation: Salaries and Expenses

Activity: Salaries of Judges

Salary of the Judge	$ 89,500	
Agency contribution for life insurance, health benefits, Medicare, Social Security, and the Judicial Survivors' Annuities Fund	6,200	
TOTAL	95,700	

Activity: Salaries of Supporting Personnel*

Salaries: Law Clerk, Grade JSP-12	33,218	
Law Clerk, Grade JSP-12	33,218	
Secretary, Grade JSP-10	25,227	
Court Reporter, Ungraded	37,185	
Deputy Clerk, Grade JSP-9**	22,907	
Agency contribution for civil service retirement, life insurance, health benefits, Medicare, and Social Security	33,145	
TOTAL	184,900	

Activity: Expenses of Operation and Maintenance of the Courts

Travel, Judge and staff	8,500	
Miscellaneous expenses (communications, supplies, etc.)		
Initial cost	10,000	
Annual cost (second and succeeding years)	14,800	
General office equipment:		
Initial cost	11,400	NR
Annual cost (second and succeeding years)	(2,300)	
Telephone equipment:		
Initial cost	4,600	NR
Annual cost (second and succeeding years)	(600)	
Word processing equipment purchase:		
Initial cost	43,200	NR
Annual cost (second and succeeding years)	(8,600)	
Library: Initial cost	29,100	NR
Annual cost (second and succeeding years)	3,800	
Furniture and furnishings:		
Initial cost	82,200	NR
Annual cost (second and succeeding years)	(8,200)	
TOTAL (initial cost)	189,000	
TOTAL (annual recurring cost)	46,800	

Activity: Space and Facilities

Rental of space	92,000	
Tenant alterations and other reimbursable services	14,800	
TOTAL	106,800	

Appropriation: Court Security

Estimated cost of one court security officer	30,400	
Initial equipment, uniform, bench armor, etc.	18,800	NR
TOTAL (initial cost)	49,200	
TOTAL (annual recurring cost)	30,400	

Appropriation: Administrative Office of the U.S. Courts

Salaries and expenses of professional and clerical staff (unit cost based on a ratio of one professional position and one clerical position to every 12 new judgeships)***	5,700	
GRAND TOTALS:		
Initial (first year) cost (rounded)	$631,000	
Annual recurring cost (rounded)	$470,000	

*Includes projected 2 percent salary increase effective January 1986.

**Based on ratio of 1.5 deputy clerks per authorized judgeship.

***Final staff support to be determined by the AO Budget Review Committee.

NR Nonrecurring expense

Prepared in: A.O. Budget Branch
Date: February 12, 1986

Twelve Regional Courts of Appeals
Appeals of Social Security Cases
Arising from the U.S. District Courts
During the Twelve Month Periods Ended June 30, 1981-1987

	1981	1982	1983	1984	1985	1986	1987
Total Filings	657	779	992	1,216	1,202	1,195	992
Total Dispositions	697	759	738	1,117	1,326	1,071**	1,094**
After Oral Hearing or Submission							
Total	520	517	516	781	900	780	837
Affirmed	374	334	373	514	468	448	509
Reversed	119	160	119	214	351	244	252
Dismissed	9	2	3	10	15	21	26
Remanded	18	21	21	43	61	61	45
Other	-	-	-	-	5	6	5
Other Judicial Action*	57	95	86	137	222	119	80
With Judicial Action	120	147	136	199	204	172	177

* Includes procedural terminations after judicial action such as jurisdictional defects, FRAP 42, default, CPC denial, transferred, and dismissed other.

** Excludes joined appeals.

APPENDIX E

COST TO THE JUDICIARY OF ESTABLISHING A NEW CIRCUIT JUDGESHIP

Appropriation: Salaries and Expenses

Activity: Salaries of Judges

Salary of the Judge	$ 95,000	
Agency contribution for life insurance, health benefits, Medicare, Social Security and the Judicial Survivors' Annuities Fund	6,600	
TOTAL	101,600	

Activity: Salaries of Supporting Personnel*

Salaries: Law Clerk, Grade JSP-12	33,218	
Law Clerk, Grade JSP-12	33,218	
Law Clerk, Grade JSP-12	33,218	
Secretary, Grade JSP-10	25,227	
Secretary, Grade JSP-10	25,227	
Staff Attorney, Central Legal Staff, Grade JSP-12	33,218	
Agency contribution for F.E.R.S., life insurance, health benefits, Medicare, and Social Security	34,882	
TOTAL	218,208	

Activity: Expenses of Operation and Maintenance of the Courts

Travel, Judge and staff	16,000	
Printing of opinions	14,000	
Miscellaneous expenses (communications, supplies, etc.)		
Initial cost	12,200	
Annual cost (second and succeeding years)	19,100	
General office equipment:		
Initial cost	14,200	NR
Annual cost (second and succeeding years)	(2,800)	
Telephone equipment:		
Initial cost	5,300	NR
Annual cost (second and succeeding years)	(700)	
Word processing equipment purchase:		
Initial cost	64,900	NR
Annual cost (second and succeeding years)	(13,000)	
Library: Initial cost	25,300	NR
Annual cost (second and succeeding years)	(3,800)	
Furniture and furnishings:		
Initial cost	56,200	NR
Annual cost (second and succeeding years)	(5,600)	
TOTAL (initial cost)	208,100	
TOTAL (annual recurring cost)	75,000	

Activity: Space and Facilities

Rental of space	35,000	
Tenant alterations and other reimbursable services	12,500	
TOTAL	47,500	

Appropriation: Court Security

Estimated cost of one court security officer	30,400	
Initial equipment, uniform, bench armor, etc.	18,800	NR
TOTAL (initial cost)	49,200	
TOTAL (annual recurring cost)	30,400	

Appropriation: Administrative Office of the U.S. Courts

Salaries and expenses of professional and clerical staff (unit cost based on a ratio of one professional position and one clerical position to every 12 new judgeships)**	5,700	
GRAND TOTALS:		
Initial (first year) cost (rounded)	$630,000	
Annual recurring cost (rounded)	$478,000	

*Includes projected 2 percent salary increase effective January 1988.
**Final staff support to be determined by the AO Budget Review Committee.

NR Nonrecurring expense

Prepared in: A.O. Budget Branch
Date: February 12, 1988

Informal Remarks made at Williamsburg, Virginia

March 13, 1983

Stephen Breyer[1]

In the next twenty minutes I shall try to put the "incentive" solutions discussed by Breger, Rowe, Miller and others into a broader context. I shall do so by making four points, which I might describe as follows: (1) the nature of the "legal explosion" problem; (2) the shortcomings of "easy" solutions; (3) the alternatives among "difficult" solutions; and (4) problems and promise of "incentive" solutions.

1. The "Legal Explosion" Problem. I see from the federal appellate bench one aspect of the broad "legal explosion" problem. I am tempted to call that aspect "overcrowding," or "too many cases." But, that label is not really correct. A growing caseload is only part of the problem; in fact, it is only background.

I do not mean to deny the importance of caseload. You are all familiar with the statistics. The amount of federal litigation has increased from one case per 4,000 of population in the 1950's to one case per 1,000 today. The number of appeals filed in the federal courts rose from 14,534 in 1972 to 27,946 in 1982. The number filed per judge rose from 150 to 212 despite a 36% increase in appellate judgeships. My experience in the First Circuit is comparable. The number of judges has increased in the last five years from three to four. The number of filings, however, has increased from 563 to more than 1,200 per year. And, each filing represents a case that must be decided. Since we rely upon visiting senior judges to fill our panels, we must decide about 200 cases per judge. Assuming half represent minor matters, we are still left with 100 cases for each judge to decide. Last year I wrote sixty full, signed opinions.

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[1] Judge, U.S. Court of Appeals for the First Circuit.

The wrong conclusion to draw from these numbers is that I am overworked. I work about as long and as hard in this job as I have in other jobs I have held. My work habits are fixed; I am reasonably healthy; I shall not change them. I shall work about the same number of hours regardless of what happens to caseloads. The right conclusion to draw is that my time may not be allocated properly. Sixty opinions per year means between five and seven per month. In each month I must prepare to hear between twenty and twenty-five cases; that takes a little more than a week. That leaves fifteen working days to write, say, six opinions. The question is, should we have caseloads that require judges to produce opinions each of which must take 2 or 3 days on average to write? If so, still, what will happen when caseloads require one-day opinions? In particular, if we are to bear such caseloads, will we be able to devote our limited time to the kind of suits that most need our attention?

I am not prepared to answer "yes" to this question, for it seems to me, on an impressionistic basis, that the federal courts could be used more wisely. On the one hand, I see cases that I suspect should not be in court. I think, for example, of last year's case of the untenured teacher claiming that the university discriminated in denying him tenure because he was a Dane. (He also lacked a Ph.D.; his evidence included an overheard comment referring to him as a "bluebeard.") Or I think of the parents who sued their daughter's school under § 1983 because the girl's midterm algebra grade had been lowered by three points for an unexcused absence. Or I think of another recent "civil rights" case which amounted to not much more than an effort to get more money than a town had already paid a fireman for injuries caused by a sneeze. The cases of the Dane, the "grade" and the "sneeze" -- trivial as they were -- cost someone money. Indeed, the first case may have cost the university between $60,000 and $80,000 -- enough money to put three additional needy students entirely through college.

At the same time, as I ponder the costs of the lawyers who appear before us, I wonder how an average person who suffers a clear, "middle-sized" legal injury could possibly afford to go to court. Suppose a building contractor ruins the roof of his house; or suppose he is cheated of, say, $5,000 or $10,000. Even if the legal right is absolutely clear, how can he afford the legal costs if his opponent decides to resist?

In sum, it seems to me likely that we could use court time, including federal court time more "efficiently." Certain cases now in court should not be there; space and time should be created for other cases now not brought. The rising caseload in and of itself, is background that makes this problem of efficient, proper and wise use of judicial time more poignant and more urgent. And it is in the form of this "efficiency" problem, against a background of rising caseloads, that the "legal explosion" forces its attention upon federal appellate courts.

2. No easy solutions. There are no "easy answers" to the "legal explosion" problem. Three popular answers -- alternative dispute settlement mechanisms, more judges, and increased use of sanctions -- while helpful and important, have serious limitations. I am uncertain, for example, about how many cases or what sorts can and should be channeled into alternative dispute resolving channels. This uncertainty arises from the fact that our object is not simply the "settlement" of disputes, but rather their "just settlement."

If one were designing an ideal system for settling disputes, one would surely seek "justice"; one would seek easy and widespread accessibility; one would want the system to be as inexpensive as possible; and one might (if it were a legal system) seek to have it expound and elaborate the law as well as correct its mistakes of legal principle. But, these objectives may conflict, and that conflict accounts in part for our uncertainty about efforts to develop alternative settlement mechanisms, more expeditious courtroom procedures, judicial case management techniques, and other mechanisms with the purpose or effect of more readily promoting agreement.

Nor is there any obviously "easy" solution in the creation of more judgeships or the provision of more court personnel. The federal judiciary has expanded over the last ten years -- from 97 judges to 132 in the courts of appeals and from 399 judges to 516 in the district courts, while the number of total federal judicial personnel has increased from 27.7 per million population in 1960 to 65.6 per million population in 1980. The federal judicial budget has risen from $171 million in 1972 to $709 million in 1982 (and from $137 million to $274 million in constant 1967 dollars). But, this type of "solution" brings with it further problems, for expansion changes the nature of the federal judicial institution, and not necessarily for the better. More staff, for example, means more delegation of decision writing (if not decision-making) to law clerks. Does this mean longer opinions with more footnotes and extraneous analysis? Does it mean the proliferation of complex rules and subsidiary "tests" that needlessly complicate, rather than simplify, the law? Do more judges themselves proliferate opinions and precedents to the point where it becomes increasingly difficult to harmonize the law from different jurisdictions, to keep up with it, or even to say what the law is? Are judges forced to devote more of their time to "managing" -- either cases or the judicial system itself? If so, are they spending less time doing what they are comparatively better at -- deciding cases fairly -- and more at what they are comparatively worse at -- administration? Insofar as one major task of a judicial system is the creation of precedent as guidance to others, there are severe limits on its capacity to grow bureaucratically.

Finally, the increased use of sanctions to deter the pursuit of frivolous suits or harrassing procedures, while desirable, also has limitations. The limitations exist because the judge has only a very limited and incomplete vision of any single case, and one often needs to understand the whole situation before one can fairly assess blame. I recall an instance in which one member of our panel expressed the extreme irritation that all of us were feeling at an absurd argument being made by an attorney suing the government. The attorney replied, "My client is sick and has no money; I am representing him for nothing because I am his friend; I know I'm not doing very well, but I'm trying to do my best for him." Would one want to assess sanctions in such circumstances? How often can a judge assess a sanction without a further hearing on the propriety of the sanction? Will there then be appeals? Will we simply have added to the length and complexity of proceedings that are already too long and complex?

In raising these problems, I am not arguing against alternative dispute mechanisms, more judges or sanctions. I am simply pointing out that they are not cure-alls. More may be needed.

3. More difficult solutions. If the comparatively simpler "solutions" are insufficient, we may find Congress or the courts forced to turn to other solutions that are more difficult to devise or implement. Let me suggest three sorts.

a. Leave to appeal. In the absence of any further organized effort to deal with the problem, I suspect that the system, on its own, will come to resemble the English appellate system where, in many sorts of cases, the appellate court's permission to appeal is required. This system might prove an appropriate solution to the problems of appellate courts -- though, of course, it does not help trial courts. It is already being instituted, in a limited way, through the medium of opinions from the bench, unpublished opinions, the submission of cases without oral argument, and so forth.

The difficulties of this approach lie not in the idea itself, but rather in the somewhat ad hoc way in which -- without further organized effort -- it is likely to come into being. To what extent does every litigant expect an appeal as of right? What are the costs of openly dispensing with this notion? Are there nonetheless certain sorts of cases, for example, where full appellate argument ought always to be heard? Are there sorts of cases where, say, with permission of the parties, one appellate judge should receive shortened briefs, hear oral argument, and deliver an oral opinion? Which cases now should, or should not, be submitted on briefs alone? What sort of publication policy should the circuits follow? What is the proper role of staff attorneys? To what extent should circuit court staff specifically seek to settle cases? These questions are being addressed individually and under the pressure of events by the various circuits, with the result that one finds uncertainty and sometimes criticism by the bar and the public. Practices differ from circuit to circuit; to the point where one might do better to address the "leave to appeal" question directly.

b. Substantive jurisdictional change. A second difficult approach is to look at the cases in the federal appellate courts by subject matter, changing the jurisdictional rules concerning those sorts of cases where appellate review seems less (or more) necessary. If, for example, a major function of courts (particularly appellate courts) is to create well reasoned opinions and to expound "the law" -- if this is what they are "best" at -- then one might wonder why such an enormous number of the civil cases before us involve no more than a review to see whether the evidence is adequate. For example, about eight percent of our civil filings consist of requests to review denials of applications for Social Security payments. Most of these denials will have already been reviewed four times (by an ALJ, an HHS review panel, a U.S. Magistrate, and a U.S. district court) before they reach us. One might ask whether five levels of review are necessary, effective or even beneficial to the applicant. Similarly, I wonder why so many of our cases involve requests by management to review NLRB findings against them for substantial evidence. At a time when there is strong pressure to remove diversity cases from the federal courts and when numerous "commercial law" cases (where one might have thought the "law guiding" function particularly important) have been relegated to arbitration, perhaps someone -- professor, judicial committee or legislator -- should review the workload of the federal courts with an eye toward deciding which sorts of cases are most effectively decided in federal courts as opposed to decision elsewhere.

If one were to carry this "substantive" approach further, one might ask where and to what extent we should seek to solve social problems through the creation of "rights" or "entitlements" (and hence through the creation of potential legal "controversies"). Other countries that seek to solve similar problems have sometimes been more successful when they sought "non-right-based" solutions. Thus, one can at least ask whether increased direct governmental expenditure might sometimes do more for, say, the handicapped, or for, say, worker safety, than "enforceable" legal rights, for example, against "discrimination" -- rights that may be given in principle but perhaps too often denied in practice. And one can ask whether informal administrative planning involving community groups and nationalized industries (as in Britain) is more, or less, successful in seeing that needed plants are built in a way that minimizes environmental and social harm, than (as in America) providing each affected group with court enforceable legal rights. The subject of more effective alternatives to classical "command and control," "right/duty-based" regulation is one I have explored in detail elsewhere. (Regulation and Its Reform (Harvard Press 1982)).

Even to suggest such an approach, however, is to call attention to its major flaw. Each current substantive right, including related jurisdictional rights, benefits particular groups of people -- often those who most need protection. They will be reluctant to give up what the law now allows them, for the mere promise of some other kind of benefit, no matter whether the promise sounds plausible. Yet, to convince most of those who benefit from the present system of the need for change, as a practical matter, is a precondition of significant change. The only way to succeed with such an approach is, I suspect, to design a package that is viewed as substantively "neutral" -- one that is not seen as favoring one group of potential litigants as compared with another.

4. Incentives. Finally, we come to incentive systems. The object of these systems is to find dollar incentives that will help get the "right" cases into court and keep the "wrong" cases out. They basically seek to make litigants with baseless or weak cases pay more of the costs of litigation, while those that have stronger cases pay less.

The type of incentive now commonly discussed concerns legal fees. The venerable "American rule" -- that each side pays its own legal fees -- is coming into question. And, more favorable words are being spoken of the "English rule," which imposes all legal fees as a cost upon the loser. The English rule has certain "incentive" and "fairness" advantages. If, for example, a plaintiff wins, why should he not recover his legal costs, which are an element of his damages? Why should the defendant not have to pay for the damage caused? A plaintiff with a strong case will be more likely to bring it; and the plaintiff with damages of a few thousand dollars would be able to afford to bring the case. The plaintiff with a weak case may hesitate to bring that case, but is this not as it should be?

The most frequently mentioned "fee-shifting" plan emphasizes these "incentive" aspects. It would combine fee-shifting with Rule 68's "offer of judgment." In essence, either a plaintiff or a defendant could offer to settle a case by paying or accepting a fixed sum. If the other side refused, the case would have to go to trial. Then, if (and only if) the final judgment turned out to be less favorable to the "refusing" party than the offer that it refused, that party would have to pay the other's costs, including attorney's fees. As amended, this rule would provide increased incentive to settle cases. It would move "weak cases" and "strong case" settlements in the right direction; and to that extent, it would allocate more efficiently and more wisely the resources of the federal courts.

Why, then, is there hostility to the English rule? Or at least to this modified version of it? Why has it not been adopted? The traditional problem with the English approach is thought to be its treatment of the plaintiff with a fairly good case who nonetheless fears liability for legal fees if he loses. This "risk averse" plaintiff might pursue his case under present rules -- particularly if he finds an attorney willing to take it on a contingent fee. He might not do so if he has to pay defendant's legal costs should he lose.

Plaintiffs in tort cases may face this problem, as may plaintiffs in § 1983 actions. Indeed, the fact that winning plaintiffs in § 1983 cases now receive legal fees, but winning defendants do not, makes the bar that represents them particularly unwilling to contemplate fee-shifting changes.

The fact, however, that there may be such objections -- even if they are backed by strong reasons and mighty political force -- does not justify abandoning the fee-shifting approach. Indeed, that is my main point. For one thing, the harm that "risk averse" plaintiffs might suffer through fee-shifting will tend to be counterbalanced by the benefit to potential plaintiffs with strong smaller claims, who now are shut out of court. For another thing, no one is quite certain how the risk averse plaintiffs or § 1983 plaintiffs would in fact react to such a change. Empirical work is called for before one can arrive at conclusions.

More importantly, these problems, whether illusory or real, call for tailoring the fee shifting proposals, not for abandoning them. Tailoring a proposal with an eye toward generating consensus is an art at which legislators and their legislative staffs are skilled. And, it is that type of skill that is called for here.

Consider, purely for the sake of providing an illustration, one incentive or "fee-shifting" proposal that would instantly generate strong political opposition. Suppose I suggested reducing the court's workload by making all litigation expenses "non-deductible" for income tax purposes. Although one could argue that the current allowable deduction as "ordinary and necessary" business expenses subsidizes commercial litigation, I imagine that the corporate bar would strongly disagree with any such argument and would strongly oppose any such suggestion for change. Suppose, however, that one modified or "tailored" the proposal as follows: 'Allow a judge to find that, because of the "baseless" or "frivolous" nature of the case or defense, one of the party's litigation expenses was no longer an "ordinary and necessary" business expense and thus was non-deductible.' Leaving aside other practical problems with the proposal, I suspect the corporate world might not oppose it strongly. After all, each corporation might reason: we do not bring baseless cases; baseless cases are what we defend against, so the proposal might help, not hurt us. It is this type of "tailoring" -- designed to meet the various objections and problems of particular groups -- that I have in mind.

There is considerable opportunity for "tailoring" for there are many "dimensions" along which cost-shifting or fee proposals can be modified. One can have "two-way" fee-shifting, one-way fee-shifting, or no shift at all. One can have automatic fee-shifting rules or leave the matter to a judge's discretion. One can have shifting for some parts of a case (say, discovery) but not for other parts. One can have fee-shifting for certain sorts of cases, or certain sorts of plaintiffs, or certain sorts of defendants. One can combine fee-shifting with offers of judgment. One can set ceilings or limits on amounts. The possibilities are nearly endless.

Finally, if it turns out to be too difficult to work out a detailed solution in a legislative forum, the Congress can always delegate appropriately limited power to the Judicial Conference. After all, Congress has trusted agencies -- the FCC, OSHA, NHRSA and others -- with considerably broader delegations of power.

In sum, the overall problem seems serious, and in light of that seriousness, fee-shifting and other incentive based proposals deserve to be taken seriously. They aim in the right direction -- more efficient use of the courts. They have problems, and developing a sufficiently broad "political consensus" of support may be difficult; but it does not seem hopeless. There is considerable work to be done; empirical work to learn from experiences; intellectual work to create feasible variations and alternatives; and political work to develop the necessary consensus. Despite the magnitude of the effort required, the approach seems promising.

Drafting Problems in S. 2292

Administrative law principles favor instructing courts to give weight to the factfinding of the adjudicative body, and to the rulemaking judgments of those parts of the agency that are more expert in making rules. Where these functions are split (as in the case of OSHA), courts have held that, while OSHRC (the factfinder) is entitled to adjudicative deference, the Secretary of Labor (the rulemaker) is entitled to deference in respect to the meaning of the rule. See Donovan v. A. Amorello & Sons, Inc., 761 F.2d 61 (1st Cir. 1985).

I will also briefly mention here the other technical problems I found in S. 2292:

1. S. 2292's definition of "rule" seems drawn from 'ripeness' cases. It might be preferable to leave "rule" undefined (or to cross-reference the Administrative Procedure Act) rather than to create a new linguistic standard for courts to interpret.
2. S. 2292 says that a court will determine the meaning of an agency's rule. This is contrary to ordinary administrative law principles which require a court to defer to an agency's interpretation of its own rules. See Bowles v. Seminole Rock Co., 325 U.S. 410, 413-14 (1945)
3. The bill's standard of review is simply "arbitrary" rather than the more ordinary "arbitrary, capricious, abuse of discretion". It may be preferable (and would produce uniformity) simply to cross-reference the relevant part of the APA.
4. The bill requires a Court of Appeals to set attorney's fees. It is difficult for Courts of Appeals to resolve any contested issues involved in matters of this sort, as those courts lack factfinding procedures.
5. The bill requires a court to award legal fees even where the attorney loses, adjusted by the probability of his winning. Any court, but particularly a Court of Appeals, would have difficulty making the judgments needed to apply this standard. The standard, as also found in S. 11, threatens to create considerable time-consuming, complex attorneys' fees litigation, without much offsetting benefit.
6. S. 2292 requires the agency to use "notice and comment" procedures in areas ("loans, grants, benefits") now specifically exempted from 5 U.S.C. 553's "notice and comment" provisions. Why should this agency alone follow this procedure in this normally exempt area, and only in the exempt area?

STATEMENT OF PAUL R. VERKUIL
BEFORE THE HOUSE COMMITTEE ON VETERANS' AFFAIRS
SEPTEMBER 8, 1988

I am President and Professor of Law at The College of William and Mary in Virginia. I have taught and published in the field of administrative law for the last seventeen years. In addition to numerous articles, my publications include a co-authored treatise for Foundation Press entitled Administrative Law and Process. I participated in the study of the Social Security disability process which resulted in a co-authored book published in 1978 entitled Social Security Hearings and Appeals. My experience in the administrative law field also includes service as a consultant for the Administrative Conference of the United States from 1973 to 1982; since then I have served as a public member of the Administrative Conference. I have also served as Chairman of the Administrative Law Section of the Association of American Law Schools and am currently chair-elect of the American Bar Association Section on Administrative Law. I appear today, however, in my individual capacity and not as a representative of any organization.

My interest in the legislation surrounding revisions of the Veterans Administration hearing and judicial review process is purely of an academic and law reform nature. I do not consider myself an expert in the actual disposition of Veterans Administration disability claims, although I have met some Rating Board members and observed a few hearings. I am familiar with the legislation that exempts veterans claims from judicial review and I have served as a consultant to the Justice Department in the NARS litigation on the question of the constitutionality of the $10 fee limit.

Currently there are before this committee several bills to change the relationship of the Veterans Administration and its disability decisions by modifying the exclusion from judicial review contained in 38 U.S.C. Section 211. I start from the overall perspective that judicial review is an essential ingredient of American constitutional law. No administrative decision can be taken without judicial oversight as to its legality and constitutionality. This is basic to our constitutional plan. However, exemptions or limitations on judicial review of factual decisions taken by the Veterans Administration or other administrative agencies is also a well established practice. "Fact review" as opposed to law and constitution review is something that the courts engage in when invited to do so by Congress.

In the case of the Veterans Administration there are good reasons for not proceeding down that road at this stage. The Veterans Administration awards over $11 billion a year in benefits payments through a system that is, by common understanding, informal, efficient and fair. Claims that are initially denied are first reviewed by a three-person Rating Board that explores the file, reviews the medical testimony and holds an oral hearing. The veteran is represented, usually, by a veterans claim representative. The file is "open" in that it can be added to at any time. A decision is issued by the Rating

Board and if unfavorable to the veteran, it may be appealed to the Board of Veterans Appeals. At that point another three-person panel reviews the decision to determine its accuracy. About 30% of the Rating Board decisions are reversed or remanded by the BVA annually; that is some indication that the review function is actually working. Thereafter of course there is no review of facts in the courts, although legal and constitutional questions remain open for the courts (see Johnson v. Robison, 415 U.S. 361 (1974), Traynor v. Turnage, 108 S.Ct. 1372 (1988)).

The question is whether it is good policy for Congress to expand judicial review of individualized factual determination beyond the administrative stage. From the perspective of one who studies the administrative process, VA disability cases have received a thorough consideration at the administrative level. Indeed when one considers the declared pro-claimant bias of the agency, it is surely one of the most generous benefactory agencies in the world. This does not mean that it is error free. No system of administrative adjudication on the scale of the Veterans Administration can claim perfection. Indeed my experience on a team that reviewed the decisionmaking of the Social Security Administration (an agency of even larger responsibility) showed errors were made and "like" cases were decided differently. The question isn't whether the decision process can be improved at the administrative level, of course it can. The crucial inquiry is whether the courts are the best mechanism to do it.

This is where, in my judgment, the recent critical report on the VA disability claims process by the Committee on Government Operations* goes wrong. It may be as that study documents that the VA system produces an unacceptable level of error but the solution is not to add judicial review to arrest it. Judicial review is itself such an episodic or random process that it cannot be utilized as a method for correcting systemic errors. Only internal adjustments in the decisional process can produce true improvements in the overall performance of the agency.

Judicial review of factual decisions is an alternative that Congress has employed with the Social Security Administration, but bringing the courts into the process ought not to be done in the VA situation simply because it is done there. Nothing in the review of SSA cases by the courts raises one's confidence in the judicial contribution to overall factual accuracy. Courts after all only see a small portion of the total caseload and can by their nature give little in the way of sustained feedback.

In the bills before this committee, H.R. 639 and S. 11 rely on judicial review of individual decisions as a corrective. The other bills (H.R. 5039 and S. 2292) do not go as far. They provide for judicial review of rulemaking by the Veterans Administration and for internal improvements in the administrative process, namely the creation of the Board of

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*Investigation of Disability Programs of the Veterans Administration, 100th Congress, 2d Sess., H.R. 100-886 (August 18, 1988).

Veterans Appeals as an independent article I court. The bills also provide for the elimination of the $10 fee limit, which is long overdue.

With respect to judicial review of factual decisions, S. 11 opens the door so slightly that it hardly fulfills the promise of its intentions. It provides that a finding of fact may be set aside "when it is utterly lacking in rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside." That standard is so narrow as to make review of facts virtually nonexistent. Any court that followed it responsibly would rarely reverse any decision of the BVA. But of course it opens the possibility for some courts to interpret it more broadly and this simply encourages lawyers to proceed into the judicial process with cases that might he better left to final resolution at the administrative level.

Judicial review of rulemaking decisions on the other hand offers a sensible way for the courts to monitor the regularity of the administrative process without becoming immersed in the individual decision context. Rules and regulations are law. The power to make law is delegated by this Congress to the administrative agency, in this situation the Veterans Administration. It is entirely appropriate that the court should play a role in shaping the law of the administration. The process that is set up in most of these bills provides for that to happen through the successful vehicle of Section 553 of the Administrative Procedure Act.

The most innovative and productive reforms in the bills however deal with the refashioning of the Board of Veterans Appeals into an independent article I court. With lawyers now encouraged to participate in the process, via the fee limit restructuring, along with claims representatives, there is every prospect that an independent Board of Veterans Appeals could improve the accuracy and fairness of individual decisions. In the present context the BVA reviews cases on an individualized basis, but has very little opportunity to shape and improve the process from the bottom up. An independent BVA would be expected to provide opinions, create precedent, review rules and regulations and thereby help reform the initial decision process through this interaction. If one were seeking to find a solution to the error rate that may now occur, that seems a very good way to start. If a feedback loop is created the error rate could well diminish. Internal reforms stick where external reforms may not. And the reform process ought to include a carefully executed statistical and empirical study of the VA's performance which, to my knowledge, has never been done.

A word about the error rate itself. It appears that the errors are more likely to go against the government than they are to go against the individual in the present setting. In other words, the BVA pays out more money erroneously than it fails to pay out to those who deserve it. Elongating the judicial review process will move this effect further in one direction. It is certainly fair for the Congress to consider the fiscal impact of judicial review as well when it decides how to proceed in improving what is a very costly process already.

There is another kind of cost attached to judicial review of individual decisions that ought to be considered as well. That is the potential caseload burden upon the court system. Although the judicial review standard in S. 11 is intended to be tightly drawn, the potential to add as many new VA cases to the federal courts as are currently produced by the Social Security Administration disability system cannot be discounted. The Appeals Council of the SSA heard about 44,000 administrative appeals in fiscal year 1986, of which 13,000 went to the district courts and 1000 ultimately to the circuit courts. Since the Board of Veterans Appeals decides about the same number of cases as the Appeals Council (44,000), one could postulate a similar impact upon the courts. This means a potential 6% increase in the district court case load and a 3% increase in the appeals case load.* Moreover, S. 11 as I read it seeks to have all VA cases heard initially in the circuit courts. If the caseload projections are any way like those of SSA, that would swamp the federal appellate system.

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*A good discussion of this probable impact is contained in Marozsan v. United States, No. 86-1954 (7th Cir. July 25, 1988) (Easterbrook, J., dissenting), slip op at 42-45.

The question is whether review of VA factual determinations is a good use of the courts' time given the need to decide questions of law that the rulemaking review provisions of these bills also present. In my view this legislation goes far enough at this stage by (1) liberalizing fee limits, (2) providing for judicial review of rules, and (3) reorganizing the BVA into an independent entity. There is simply no need to go further and add judicial review of facts to the list. The Veterans Administration is a willing, not recalcitrant, bureaucracy. It wants to helps its claimants. Regularizing the administrative process may be a beneficial step, although even this will not be cost-free since the system will inevitably become more defensive and record-building prone. But at least this is an internal reform. To go beyond these reforms at this time, and ask the courts to review potentially thousands of individual decisions, would threaten a major disruption to an agency which seems to work well with little overall benefit to the intended beneficiaries of the system: the Veterans and their families.

Thank you for this opportunity to appear before the Committee and I look forward to answering any questions you may have.

Statement of
John F. Heilman
National Legislative Director
Disabled American Veterans
Before the
Committee on Veterans' Affairs
United States House of Representatives
September 8, 1988

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

On behalf of the more than one million members of the Disabled American Veterans (DAV) and its Ladies Auxiliary, I express our appreciation for the opportunity to present our views on judicial review of veterans' claims. A table of contents of our Statement is attached hereto as Exhibit A.

I. Introduction

Members of this Committee have become fully acquainted with the issue of judicial review of Veterans' Administration (VA) decisions during more than a decade of pending legislative proposals on the subject. Moreover, the Senate-passed bill now before you (S. 11) is the product of more informative consideration than its predecessors received because, on April 18, 1988, the first viable compromise offered throughout the decade (S. 2292) was introduced in the Senate. The pending measures, S. 11 and S. 2292, were subsequently addressed together at the hearing before the Senate Committee on Veterans' Affairs, where DAV submitted extensive written testimony expressing its strong preference for S. 2292; in the Senate Report on S. 11, which was ordered to be reported by the Committee several of whose members voted to report S. 2292 instead; in the Senate floor debate on S. 11, where S. 2292 received significant (and bipartisan) support in the form of 36 votes against a motion to table S. 2292 as an amendment to S. 11; and in the Senate floor debate on S. 533, the bill to elevate the VA to Cabinet-level status, which directly and indirectly addressed matters germane to judicial review.

In light of the foregoing recent developments, we believe the issue of judicial review has finally been joined in a meaningful fashion. We are also optimistic about the prospects for compromise along acceptable lines, because of the nature and degree of support S. 2292 was able to garner in just the three months that it was available for Senate consideration. Accordingly, DAV will make an effort to focus its comments on the central issues as they have newly become identifiable. In the process, we will try not to duplicate much of what has gone on before, relying upon Members' familiarity with that history and upon incorporation of relevant information more by reference to available materials than by repetition herein.

II. The Emerging Consensus Toward S. 2292's Principles

At the outset, we should acknowledge the responsible effort reflected in the Senate-passed bill to embrace principles acceptable to both sides of the judicial-review debate, a process that has traditionally characterized the conduct of veterans' affairs by the Congress. We also hope to resolve the uncertainty with which DAV's position was described during the Senate debate, in which it was suggested that we were both "locked in" to a "long-held" position and had engaged in a "sudden shift" due to "subtle pressure" from the VA. Neither view, of course, is true.

DAV recognizes that some unsuccessful VA claimants have developed a perception of unfairness with respect to the adjudication of VA claims because of the current preclusion of court involvement in most VA decisions, the lack of independent review of VA claims by the Board of Veterans Appeals (BVA) and the intensive media coverage of criticism of the agency. We also acknowledge the strains placed upon the VA's adjudication system by the one-third reduction in adjudication personnel that has occurred over the last several years. In light of these evolving circumstances, we agree that certain changes in the system would be both symbolically and substantively beneficial.

DAV therefore strongly endorses the reforms set out in S. 2292: independence for the BVA, enhanced by a power to rule on the validity of VA regulations; expanded judicial review, to permit U.S. Courts of Appeals to consider all aspects of broad VA policy determinations outside the rating schedule; and creation of an opportunity for claimants to retain counsel in challenging such VA policy determinations before the BVA and the courts.

DAV notes and appreciates the inclusion, in S. 11 as passed by the Senate, of the principle of BVA independence and an expansion of judicial review to include VA policy matters, as first proposed in S. 2292. We also note proposals originally in S. 11 that we endorsed in S. 2292, such as the principle of compensation for attorney representation of VA claimants before both executive and judicial branches in circumstances where legal skills would be particularly useful, and salutary provisions in S. 11 alone, such as the procedural changes expanding the type of evidence needed to reopen a claim and declaring a 2-1 vote for a claim allowance to be a final decision of the BVA.

The foregoing indicates to us a substantial basis for resolving the legislative stand-off that has marked the longstanding controversy over judicial review of VA decisions. What stands more in the way of agreement than any other issue is the question of fact review in federal courts, for which S. 11 provides in ways even its supporters seem not to grasp fully and to which we are firmly and -- as we hope to establish below, correctly -- opposed.

III. The Fact-Review Obstacle of S. 11

It was observed in the Senate Report on S. 11 that "the most fundamental reason for judicial review" is to provide an avenue of independent relief for those whose VA claims are denied because of BVA fact-finding that would violate the standard of review proposed in S. 11: "[S]o utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside." It was stated in the Senate floor debate that such review "would benefit all parties involved."

DAV's assessment of those benefits -- and the costs -- of the fact review that would be provided by S. 11 make it abundantly apparent to us that precious little would be achieved for VA claimants by this change at a cost to those same claimants of unarguably greater magnitude, however difficult it may be to quantify either value with precision.

A. The Minimal Benefits of Fact Review

We will address later, among other things, the uncertain meaning of S. 11's unique standard of review, quoted above. For purposes of this discussion, it is enough to say that the bill's proponents appeared pleased that Judges representing the Judicial Conference of the United States had just testified that the standard would make it, in the words of one Judge, "very, very, very, very hard to overturn" a VA fact finding, and in the words of another Judge, "almost impossible" to do so.[1]

Taking this view of S. 11's standard at face value, it is consistent with the expression in the Senate floor debate that VA claimants should have fact review in the federal courts even if there is only "one mistake . . . in a million." In fact, DAV believes that this expression roughly captures the extent to which there do or will exist claimants whose cases contain adverse fact findings and who have not been able to obtain relief under BVA Rule 85 (reconsideration upon allegation of "obvious error of fact") but who would still be able to obtain judicial relief under the S. 11 standard.

That no more than a handful of such cases might survive uncorrected out of the millions of appealable decisions made annually by the VA is reflected in the paucity of examples provided for the legislative record, despite extraordinary efforts to produce them. Those efforts include investigations by the Congress, such as the recent report of the House Committee on Government Operations, whose Subcommittee's oversight hearings on the VA's disability compensation program developed one principal case in which the claim of a very sympathetic claimant had been denied by the BVA seven times, even though the Subcommittee "believes the material provided by the VA does not support the BVA's denial". Those efforts also include years of discovery of millions of pages of documents and several knowledgeable and cooperative witnesses from the VA in the pending case of *National Association of Radiation Survivors (NARS) v. Turnage*, as well as the national media interest which that case spurred in specimens of pathological decision-making by the VA that should have provoked seriously aggrieved VA claimants to come forward.

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[1] Indeed, the extreme rarity of a case that would be set aside under the S. 11 standard suggests that a factual determination in violation of it would also be so shocking that it would likely be viewed as violating substantive due process requirements, too. As the Senate Report notes, judicial review of such a case would be available under current law, not -- as the Report speculates -- because the preclusion statute itself would be found unconstitutional, but because the Supreme Court has interpreted the preclusion statute not to cover allegations of constitutional error.

In the end, we are cited to the same reported VA insurance case in the Senate Report and floor debate that presents VA fact findings assertedly in violation of the S. 11 standard, accompanied by expressions of confidence that because this case happened to fall outside the current preclusion of judicial review, there must exist other BVA fact findings precluded from review that are just as "grievously flawed." Other references in the debate to a few apparently hard cases of individual constituents are no more persuasive of a proliferation of BVA fact findings in violation of the S. 11 standard.

We are very mindful of and grateful for the conscientious desire embodied in S. 11 to minimize the disruption that could befall the VA should courts be invited to substitute their judgment for that of the BVA on review of the latter's findings of material fact, an intention that nevertheless competes with the bill's desire to hold out a judicial incentive sufficient to motivate the BVA to improve its fact-finding processes. But these conflicting intentions put a Hobson's choice that we do not believe can be resolved in a way that makes rational, cost-benefit sense.

On the one hand, we do not believe any evidence has been offered to demonstrate that there are more than a handful of BVA fact findings that exist and that would be set aside under the standard currently set forth in S. 11. Thus, not only are there almost no claimants who would individually benefit from such judicial review; there is also almost no institutional benefit to be gained by creating an incentive for the BVA not to perform in a way it nearly never performs anyway. On the other hand, to broaden the standard of review to make reversible more cases (and thus arguably create greater individual and institutional benefit, if such defective cases exist) would impose in even greater degree the very costs that S. 11 proponents themselves would seem to agree are unacceptable.

In a responsible effort to try to minimize those costs, the proponents of S. 11 have plainly struggled to devise the narrow standard of fact review at issue. But even if one disagrees with us about the marginal benefits that that standard would likely produce (which may in fact be none at all, see note 1 supra), it is in our view more clear that the costs the standard would occasion have been, if not ignored, at least seriously understated, and that they would still outweigh any likely degree of benefit. That is why DAV supports expansion of judicial review only with respect to legal questions, and supports reform of the BVA as the better way to address whatever problems may exist concerning its fact-based determinations while simultaneously instilling greater claimant confidence in the outcome.

B. The Substantial Process Costs of Fact Review

The Senate floor debate contains a caution about the extent to which observations about the impact of judicial review are "pure speculation." Although it is true that we cannot don green eyeshades and count numbers, the behavior of the legal system is, if nothing else, predictable by reference to the well-established principles under which it has always operated in this country. No system grounded in the notion of precedent is impenetrable to those familiar with it, as the Members of this Committee are with the interaction of courts and lawyers concerning agency action and their common bond, the record. Examination of these features of the legal environment will illustrate the unjustified costs of S. 11 that we have in mind.

(1) Lawyers' Advocacy as an Instrument of Cost Imposition. One supporter of S. 11 stated in the Senate floor debate: "We need not fear the legal profession," having reference to the question of legal fees that would be chargeable to VA claimants under S. 11. Although the diversion of benefits to lawyers is a concern that DAV has not been shy to voice, the concern we would stress here is not one based on money paid by the claimant, but on the nature of the services rendered by the lawyer.

As Professor Lieberman wrote in 1986 for the University of Chicago Law Review in commenting on lessons learned from the alternate dispute resolution (ADR) movement: "The adversary process . . . operates on a theory of fundamental distrust . . . . In contrast, the creation of trust is central to the design of many ADR processes." Such views implicitly underlay the subsequent warning on the "central challenge to the legal profession" announced by former Deputy Attorney General Burns, who observed in the

Administrative Law Journal of 1987: "Lawyers as a class are imbued with a will to win. The formal adversary system allows, if not encourages, a win-at-all-costs attitude . . . . Unfortunately, [this] is not always in the best interest of clients or of the justice system." The U.S. Supreme Court, quoting Chief Judge Friendly in the NARS case referred to earlier, perhaps put our concern best:

> Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his clients' cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty.

By training, and by the ethical duty to represent clients zealously, the lawyer is indifferent to system costs, indeed even to truth, in the zealous pursuit of his clients' interests. Given the inducement and the opportunity, the lawyer will treat the VA claims adjudication system as the enemy, and, as Chief Judge Friendly said, a lawyer's appearance on behalf of a VA claimant "is likely . . . at least to cause the government's representative to act- like one." The inducement to such behavior is review of fact-based decisions in the federal courts; the opportunity for such behavior is in the procedures created by S. 11; and the victim will surely be the informality, generosity and efficiency of the current VA system.

(2) Judicial Standards as the Inducement to Advocacy.

(a) Erosion of S. 11's Fact Review Standard. We discussed previously the unique standard of review in S. 11 for BVA findings of material fact and noted the laudable attempt made to restrict this standard to prevent undue judicial intrusion into expert functions that DAV believes should remain the exclusive purview of the BVA, armed with new authority and independence as proposed in S. 2292. Wholly apart from the absence of any effort to guard against the hidden pitfall of S. 11 -- judicial review of mixed questions of law and fact, to which we shall turn later -- we view this attempt to stem the legalization tide for review of questions of fact as not unlike the proverbial Dutch boy who puts his finger in a collapsing dike. The proof of this analogy is found in the Senate floor debate, where S. 11's fact-review standard has already suffered erosion and where reliable indications of future statutory liberalization of the standard emerged.

As to that erosion, several S. 11 proponents, including the current and one former chair of the Senate Committee, discussed the standard for fact review in an effort to clarify its meaning. In the end, it was observed that the S. 11 standard should not preclude a judge from setting aside an erroneous fact finding if it amounted to a "serious injustice," a standard in which that former Committee chair would "concur completely". The author of the "serious injustice" standard, who predicted there will be "many cases" under this new standard, had earlier sought to insure that the S. 11 standard would not represent the eye of a needle that could not be threaded, and the current chair stated he would "associate" himself with those remarks.

While not a model of clarity, one can imagine the enthusiasm with which a zealous lawyer could legitimately argue to a reviewing court that his client was the victim of a "serious injustice" entitling him to relief under S. 11. To repeat, it is not the relief to which we object, but to the inducement to the "legal profession" to invade the VA claims system and seek to create error under this less than daunting standard, with its predictable adverse effect on the overwhelming proportion of VA claimants who now receive decisions on a less costly and more generous and speedy basis than they would under a system reacting to the "win-at-all-costs" representation of lawyers.

Regardless of how the S. 11 fact-review standard might be construed, one proponent in the Senate debate stated that "many of us believe that the scope of judicial review in S. 11 is drawn too tightly," and another said that the standard would be supported "at least to open the door." The Committee chair then responded that if the standard were found to be "unreasonably restrictive," he was "certain" the committee "would revisit the issue and remedy the problem." To use another metaphor, the enactment of the S. 11 standard would thus seem clearly to create a slippery slope as pressure for liberalization of the standard would arise, not just from those already committed to it, but from the legal profession whose zest for yet another growth industry would have been fueled by its taste for "serious injustice".

(b) S.11's Hidden Pitfall: Mixed Questions of Fact and Law. Apart from the demonstrable difficulty of containing S. 11's fact-review standard to provide any sense of confidence that its effect on the VA claims system would be tolerable, there is the unexamined question of review of mixed questions of fact and law. In this regard, there seems to be a discontinuity in the Senate's consideration of the issue.

The Senate Report acknowledged that "most VA cases . . . present a mixture of legal and factual questions," illustrated in part by the "application" of a regulation to the facts of an "apparent disability". Professor Koch, in his administrative law treatise, defines the "authority to make individualizing decisions in the application of general rules" to be "individualizing discretion." He then states that "informal adjudications" are "dominated by specific facts and individualizing discretion" and defines "informal adjudications" to be "informal proceedings that focus on deciding individual rights," like VA claims proceedings. Such informal adjudications "are generally reviewed under the arbitrariness standard," under which he believes "the court should undertake a searching inquiry." The conclusion to be derived from these definitional steps is that "most VA cases" should be exposed to a "searching inquiry" by a court to determine if the BVA's application of law to the facts of a particular case constitute "arbitrariness".

The provision in S. 11 authorizing a court to set aside a BVA "decision" or "conclusion" found to be "arbitrary and capricious" seems without question to contemplate judicial review of mixed questions of law and fact under an arbitrariness standard as just described. Indeed, the Senate Report confirms this reading in declaring the Committee to have decided "against including a provision permitting review of questions of law only." Yet with regard to a finding of material fact subject to the narrow standard discussed earlier, the Senate Report explains that the Committee rejected the "arbitrary and capricious" standard because it "would carry with it [a] confused body of law."[2]

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[2] Given the similarity of S. 11 and H.R. 639, we have confined our attention to (Footnote Continued on Next Page)

DAV submits that S. 11's failure to treat mixed questions of law and fact in the same limited fashion that it seeks to treat findings of material fact will "open the door" even more to judicial review of "most VA cases." Whether we have grasped the subtleties of the foregoing issue with complete accuracy, our attempt to analyze the problem surely reveals the field day a lawyer could have in creating a factual record that would allow argument to a court that the BVA's application of law to the facts of an individual case was "arbitrary." DAV submits that such an argument would even be easier to mount than an argument that a fact finding amounted to a "serious injustice."

Whatever the absolute meaning of these two different standards in S. 11 for judicial review of fact-based determinations, if they can ever be ascertained, we hope it is clear that S. 11 has made these two brass rings quite accessible to courts and lawyers. The extreme difficulty of minimizing their intrusion (*i.e.*, of attempting to be a little bit pregnant) is what led S. 2292 to provide that, apart from constitutional issues: "In no event shall the

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2/ (Footnote Continued From Previous Page)

the former given its passage by the Senate. We would point out here, however, a fundamental difference between the two: H.R. 639 would invite even *greater* judicial intrusion than S. 11 because it would expressly subject VA findings of fact to the "arbitrary and capricious" standard, which was expressly rejected by the Senate as to such issues.

facts of the appeal or the application of any law or regulation to those facts be subject to review by the reviewing court."

(3) S. 11's Procedures as the Opportunity for Lawyers' Advocacy. One proponent of S. 11 stated in the floor debate that the bill prevents retention of counsel "until the veteran has exhausted all the appeals process within the [VA]." Were the lawyers' opportunity to engage the VA system in dispute so limited, our objection to the unacceptable costs of fact review would be undermined, for the merry-go-round would more haltingly move toward the brass rings just described. Unfortunately, the adjudication procedures spelled out in great detail in S. 11 provide lawyers with all manner of animals to ride on and calliope melodies to play in pursuit of the prize. We shall outline only one procedural option to provide a sense of the potential for adversarial mischief.

Whether a claimant seeking judicial review of adverse BVA fact-based determinations would argue an "arbitrary" application of law to the facts or a "serious injustice" done in a finding of material fact, it is the facts of record on which any such argument must be based. The more facts there are, the more opportunity there is for argument that the significance of one or more of them was fatally misunderstood by the agency, requiring that its decision be set aside.

To make clear the intention of S. 11 in this regard, it was stated in the Senate Report that the bill's procedures were primarily designed "to provide a claimant with a clear opportunity to develop a complete administrative record on the basis of which a reviewing court might understand and evaluate the VA's decision." The Committee emphasized, and it was confirmed during the floor debate, that an attorney would not be "restricted, in appealing to court, to relying on the administrative record in existence when the attorney entered the case," because then "the attorney would be unable to improve the agency record." Thus, S. 11 provides attorneys with the opportunity to reopen the case on mandatory ("new and material evidence") or discretionary ("good cause") grounds.

It takes little imagination to forecast the standardization of reopening requests asserting that the development of the VA record by a nonlawyer is so inherently inadequate due to the comparative unfamiliarity of nonlawyers with record-building for judicial-review purposes that adding the incremental value of an attorney's assistance constitutes virtually presumptive good cause. Upon obtaining a reopening for these or other purposes, an attorney can take advantage of the S. 11 opportunity to "improve" the agency record at the local rating board, which is authorized to operate as an arm of the BVA acting through the "agency of original jurisdiction."

Among other activities that might be undertaken by an attorney before the local rating board, S. 11 creates the new procedural right to "serve written interrogatories on any person, including an employee of the [VA]." If unanswered, the attorney may obtain a subpoena to compel that person to appear and give testimony at a deposition on written questions. Such devices are at the heart of concerns about the litigation explosion in the United States because they are the engines of discovery abuse.

The Senate Committee consciously elected to create the new authority for serving interrogatories, but not authority to subpoena or cross-examine witnesses, in order to avoid "serious disruption of the VA adjudications [sic] system [that] would serve to turn supportive, informal hearings into adversarial ones." The effort to minimize disruption is one that we respect, but which we believe is swallowed by the bill's principal goal of allowing development of a "complete administrative record" for judicial review. It resembles the earlier-mentioned effort to prevent undue court intrusion into VA decision-making with a narrow review standard for fact finding that in our view is swallowed by the erosion of that standard during the Senate floor debate itself, pressure even now to liberalize it in the future and preservation of the traditional arbitrariness standard for reviewing mixed questions of law and fact.

DAV believes that S. 11 presents the prospect of lawyers who can get paid to employ zealously the tools of their distrusting trade to "sow[] confusion" in the record of VA claimants at the rating board level in an effort to build in error sufficient to satisfy the very accessible standards of "arbitrariness" or "serious injustice". The effect of such a process on VA adjudicators, their supervisors and their counsel in the Department of Justice who would represent them in court -- particularly in terms of reacting with defensive record-building tactics and a correlative hardening of attitudes toward claimants who require such behavior -- can only lead to the expense, delay, formality and adversarialness that we have come to associate with litigation. We do not believe the case has been made, in terms of unwarranted claim denials, to justify such a costly transformation of the VA adjudication system. In an era when alternatives to litigation are the touchstone of an enlightened bar, we believe that S. 2292's reform of the BVA and expansion of judicial review to cover all policy pronouncements is the properly balanced alternative.

IV. Other Considerations

A. The Check-and-Balance Function of Veterans' Organizations

The Senate Report, in sentiments echoed during the Senate floor debate, asserted that the original rationale behind the 1933 enactment of judicial-review preclusion for VA decisions -- that veterans' benefits are "mere gratuities" -- has been rejected by the U.S. Supreme Court. It was further asserted during the Senate debate that judicial review as proposed in S. 11 is necessary because the "limited resources" of the veterans' affairs committees of the Congress do not permit effective oversight of the VA. Finally, several concerns were expressed in the debate over insuring the operation of constitutional "checks and balances" with respect to veterans' affairs.

Each of these reasons cited for judicial review as proposed in S. 11 ignores not only the contribution that S. 2292 would make in this respect, but also a consideration that DAV believes is vital -- the development of the veterans' service organizations (VSOs). In an article authored by DAV and published more than a year ago in the National Law Journal, a copy of which is attached hereto as Exhibit B, we sought to summarize the development of modern-day VSOs which began essentially with the New Deal.

The core point of the attached article is that DAV and the other VSOs were chartered by the Congress expressly to perform the relevant quasi-governmental function under the Constitution. As the article states, the operation of the legislative programs of the VSOs is "comparable to the judicial check on executive action, and indeed, produces greater uniformity and greater electoral influence over agency decisions."

It is not always with pleasure that critics acknowledge the effectiveness of the VSO check-and-balance function, but the criticism serves only to underscore the validity of our point. Those who followed the editorial resistance in the print media to elevation of the VA to the Cabinet will recall the scripted litany of opponents contending that veterans do not need any more "clout" than they now have through VSOs. Indeed, one former chair of the Senate Committee who opposed elevation of the VA relied in part on the fact that when VSOs seek to exercise their legislative influence,

> you better get out of the way because the velocity of the currents rushing into the Chamber to cast an "aye" vote will suck all the air out of the Chamber.

Among the arguments urged on the Senate floor in support of S. 11 was the benefit it would create with respect to the "VA's handling of . . . claims based on exposure to radiation from the detonation of a nuclear weapon." The attached DAV article pointed to the then-pending "legislation to provide significant relief for atomic radiation claimants" as an example of the corrective oversight role VSOs play. That legislation was recently signed into law despite urgent pressure within the executive branch for a veto, an achievement for which DAV is proud to take its share of credit.

Thus, whether or not Congress originally enacted the statutory preclusion based on a view of veterans' benefits as gratuities, it does not matter that such a view is no longer valid. In the ensuing 50 years or more, the VA claims system has adjusted to preclusion in significant part through the development of VSOs' free service and legislative programs, providing additional reason to resist the costly reform proposed in S. 11. Congressional oversight resources are effectively extended by VSOs which, despite their lack of recognition, were created by Congress in part to perform the very check-and-balance function that some would prefer be performed by expensive litigation. As DAV's attached article points out by reference to the Garcia case, the U.S. Supreme Court has indicated that such a preference "disserves principles of democratic self-governance."

B. Cabinet Status and Alternate Dispute Resolution Mechanisms

In DAV's testimony before the Senate Committee in support of S. 2292, the table of contents of which is attached hereto as Exhibit C, we discussed the potential advantages to the VA adjudication system presented by the possible elevation of the VA to Cabinet-level status. As we said in the attached article: "We are convinced that good management and good government can realize the potential value of [the VA's] unique adjudicatory system while preserving its special features."

After the DAV article was published, the House bill to elevate the VA was reported out of committee and overwhelmingly passed. After presentation of DAV's Senate testimony on judicial review, the Senate similarly passed its bill (S. 533) to elevate the VA. During the floor debate on S. 533, nearly twenty Senators who rose to speak in support of the bill stated that among the reasons for their support was that its enactment would measurably improve the agency's performance; a dozen spoke specifically of improved "management."

Thus, in addition to the changes proposed in S. 2292 to reform the BVA, expand judicial review of legal issues and provide reasonable compensation for attorneys to assist claimants in both forums, and in addition to the effective claims and oversight work accomplished by the VSOs (which include such innovations as DAV's development of a million-dollar, computer-assisted training program for its nationwide corps of more than 250 service representatives), there will soon be available the potential contributions of Cabinet-level management attention directed toward the improvement of VA claims adjudication.

The addition of the latter poses the issue in a particularly illuminating way because, from the perspective of alternate dispute resolution (ADR) mechanisms, management reform throws the remedy of fact review in federal court proposed by S. 11 into stark relief. As we noted earlier: "The adversary process . . . operates on a theory of fundamental distrust . . . . In contrast, the creation of trust is central to the design of many ADR processes." It is our belief that Cabinet-level management will have a special opportunity to invigorate the trusting relationship between the agency and those whom Abraham Lincoln declared to be its responsibility.

We hope the Congress sends a unifying message to American veterans about the concern of government for their well-being and the desire of government to inspire their trust. The country is now twenty years from the height of the Vietnam War, the aftermath of which has seen unusual controversy in the veterans' community. Enactment of legislation that would foster a litigative approach to veterans' claims would not only send a conflicting message to the country, but also risk institutionalizing controversy in veterans' affairs and thereby undermining the special relationship veterans have always had with their government. We should make every effort to preserve that special relationship, not replace it with adversarial norms that our litigious society is increasingly finding unacceptable. As we said in the attached article, the current VA system is "well-suited to [those] in search of creative alternatives to litigation."[3/]

V. Final Comments Supporting S. 2292

Throughout our testimony we have sought to inform the Committee about S. 2292's approach to the issue of judicial review, both in our discussion of the substantial common ground we find in the approaches of S. 11 and S. 2292 and in our strong preference for S. 2292's express prohibition on judicial review of fact findings and mixed questions of law and fact that S. 11 would expressly allow. There remain a few points we would like to clarify.

[3/] In the context of urging a continuation of the special treatment Congress has provided veterans, we note assertions by several participants in the Senate debate that the preclusion of judicial review has "discriminated against" veterans and singled them out for treatment as "second-class citizens." Proving that politics makes strange bedfellows, we fully associate ourselves with the remark of one former chair of the Senate Committee and proponent of S. 11 who threatened vigorous reaction "if we are going to get down to this hype and hoorah and hysteria every time we talk about veterans, that they are all second-class citizens."

DAV understands the concern expressed in the Senate debate about BVA independence, although we do not go so far as to agree, as at least one participant argued, that the lack of it violates due process requirements. Our appreciation for those concerns is why we support the novel provisions for BVA independence in S. 2292. In fact, by authorizing the BVA to rule on the validity of VA regulations, S. 2292 provides greater independence than S. 11's proponents would, although some object to restrictions on BVA decision-making by reference to the very statutory provision that binds the BVA to VA regulations. Moreover, they complain that such authority would produce a "greater workload" for the BVA even while asserting that use of such authority would be a "rare occasion" and even though two-thirds of the 400 days it takes the BVA to decide an average case are spent at the understaffed, local rating-board level.

We cannot understand these self-canceling objections to BVA authority over VA regulations. As to the reservations about BVA competence, surely growth would accompany greater responsibility. And as to the possibility of devious tactics by counsel to present "nonmeritorious challenges" to VA regulations in order to secure compensation for representation on fact-based issues, no doubt some combination of professional responsibility requirements and tribunal sanction standards would provide an effective deterrent. In addition to BVA independence, authority over regulations would provide a new opportunity for claimants to retain counsel prior to judicial proceedings and would yield refining decisions that would facilitate any ensuing judicial review. Last, it would give lawyers and courts an opportunity to do what they are best suited to do: resolve legal issues of broad importance to VA claimants.

Remarks in both the Senate Report and floor debate assert that S. 2292 is being "billed" as creating an Article I court. It may well be that passage of S. 2292 would as a practical matter result in a reformed BVA being fairly viewed as the functional equivalent of such a court, but we are sensitive to the observations in the Report that the BVA does not lend itself to "transformation . . . into a fully independent Article I court," especially not without time for more careful deliberation. We are also mindful of Paul Verkuil's cogent testimony before this Committee that even regularizing the administrative process would make the VA system "more defensive and record-building prone," a result we most seriously wish to avoid.

But as Professor Verkuil, now President of the College of William & Mary and former law school dean, also observed, of all the bills now before this Committee, the "most innovative and productive reforms" deal with refashioning the BVA, a step first proposed in S. 2292. We believe that step, which includes BVA authority over all VA regulations except the rating schedule, coupled with expansion of judicial review and provision of attorneys' fee with respect to those issues, puts courts and lawyers to their best use, provides meaningful redress to VA claimants on the most important questions and continues the VA claims system at the vanguard of efforts to develop alternate means of administering government programs, where the system began when the VA was created and the complementary development of VSOs proceeded in earnest.

We hope this Committee shares our belief in the value of joining the balanced reform of S. 2292 with the elevation of the VA, to create the best environment for continuing into another generation the special recognition our government accords to those who have served and sacrificed on its behalf.

Ex. A:	Table of Contents, DAV House testimony
Ex. B:	DAV article in National Law Journal
Ex. C:	Table of Contents, DAV Senate testimony

EXHIBIT A

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Statement of
John F. Heilman
National Legislative Director
Disabled American Veterans
Before the
Committee on Veterans' Affairs
United States House of Representatives
September 8, 1988

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EXHIBIT B

Vets Are Helped

THE MEDIA recently have given an unusual amount of attention to some critics, basically lawyers, who have attacked the system by which the Veterans' Administration administers benefit claims. The criticism stems from disappointed claimants' limited access to courts and lawyers. The public treatment of this issue has thus far misapprehended, at best, the value of the quasi-governmental function performed by the many private, non-profit veterans' service organizations (VSOs), which provide an effective claimant remedy well-suited to a bar in search of creative alternatives to litigation.

The VA was formed pursuant to an executive order signed by President Hoover in 1930 and assumed the function, among others, of adjudicating claims for benefits. The preclusion of most VA benefit decisions from judicial review was made express in the Economy Act of 1933. Between the end of World War I in 1918 and the end of President Franklin D. Roosevelt's first term in 1936, Congress also chartered the three largest and best-known of the VSOs: the Disabled American Veterans (DAV), the Veterans of Foreign Wars and the American Legion. By statute, the VA must "recognize" the VSOs to permit them to perform their principal service: the representation of VA claimants. Since 1862, no one has been permitted to charge more than a maximum fee (today, $10) to represent a VA claimant. These non-profit organizations represent members and non-members alike at no cost.

The lawyer-critics generally seem to believe that there is something inherently wrong with the VA system because it limits the role of courts and lawyers, ignoring other systems that are not subject to judicial review such as that administered under the Federal Employees Compensation Act, which annually dispenses over $1 billion. That view should surprise no one. Lawyers are trained in the common law tradition under hoary maxims like ubi jus, ibi remedium (where there is right, there is remedy), and courts have been the invariable common law means by which such remedies have been provided.

But the old English system of justice that we inherited never had to contend with a community of over 28 million veterans served by nearly a quarter of a million federal agency employees who annually process six million claims and dispense $15 billion in benefits. In modern American society, where alternate means of dispute resolution are the touchstone of an enlightened bar, we should welcome and encourage the unique advantages of the current VA benefit system.

The lawyer-critics want courts to ensure that the VA properly administers the statutorily based VA benefit scheme. But under the current system, many hundreds of professional non-lawyers employed by the VSOs provide free representation to VA claimants and can prevent or at least identify from their everyday representation before the VA recurring deficiencies in the agency's fidelity to congressional directives themselves.

ITS KEY elements having been established contemporaneously with the federal agencies created during the New Deal, the VA system was part of the modern administrative state studied by the attorney general before the enactment of the Administrative Procedure Act. By 1941, experience led the Attorney General's Committee on Administrative Procedure to conclude that the VSOs are quick to correct through legislative action both "common question[s]" underlying VA claim denials and "vagaries of policy" they detect at broader levels. In fact, the committee thought that the effective legislative attention commanded by powerful VSO memberships would be "dominant if ever there were to be a head-on collision between them and the [VA]."

By contrast, the judicial review sought by the lawyer-critics on questions of individual benefit determinations is unlikely to provide more relief than is available through the independent review provided by the Board of Veterans Appeals (BVA), where lawyers fare no better than VSO non-lawyers. And both such review mechanisms must stay within the bounds of already enacted law.

Examples of the current system's responsive flexibility abound. No one can deny the pervasive public sentiment that finally has developed in favor of Vietnam veterans. It has led to, among other things, legislation authorizing the national memorial, readjustment counseling centers for post-traumatic stress disorder, and Agent Orange study and treatment. These belated achievements reflect a sympathetic climate that will be sustained in the years to come. For veterans of an earlier era, legislation to provide significant relief for atomic radiation claimants, now pending and likely to be enacted, also is illustrative.

The corrective oversight role played by

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Mr. Zengerle, a partner in the Washington, D.C., office of Boston-based Bingham, Dana & Gould, is counsel for DAV. Mr. Joeckel, a combat-disabled Vietnam veteran, is the executive director of DAV, which has a nationwide membership of more than 1 million disabled veterans.

BY JOSEPH C. ZENGERLE
AND CHARLES E. JOECKEL JR.

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VA System Should Limit Lawyer, Court Roles

Continued from page 9

VSOs is thus comparable to the judicial check on executive action, and indeed produces greater uniformity and greater electoral influence over agency decisions. Effective political influence before the Congress, not legal advocacy before the courts that would largely duplicate the work of the BVA, is the better way to resolve the mass-justice issues presented in the adjudication of VA benefit claims.

As the Supreme Court determined in 1985 in *Garcia v. San Antonio Metro*, even with respect to constitutional issues, judicial review should be minimized when the interests of aggrieved parties are safeguarded by significant legislative influence (in *Garcia*, the direct and indirect influence of the states in the Congress). When Congress authorizes a VA benefit scheme and charters VSOs explicitly to perform a quasi-governmental function in the administration of that scheme, conditions similar to those in *Garcia* exist that more than justify the Congress' minimization of judicial review.

WHAT THE current system also provides is a sense in every veteran of personal influence based solely upon his or her service in uniform, a sense that increases with the degree of a veteran's service-connected disability and participation in VSO activities. That influence further provides a tangible demonstration of how our government democratically fulfills its obligations to citizens who have honored their duty to serve.

The introduction of more courts and lawyers into the system would dilute the self-esteem derived from the operation of the current system by veterans qua veterans and, as the Supreme Court just held in *U.S. v. Johnson* with respect to suits under the Federal Tort Claims Act, "undermine the commitment" to national service that the VA was established to foster. After all, constitutional claims such as those presented in the pending challenge to the statutory fee limit, and challenges to VA rules such as that involving alcoholism now pending in the Supreme Court, already are permissibly litigated. More litigation would add little, if any, overall improvement to the VA's administration of congressionally authorized entitlements.

Finally, the diversion of judicial, agency and claimant resources to support the more formalized adversarial system that lawyers' involvement would inevitably bring has not been shown to be justified in any reliable cost-benefit analysis. For example, a VA inspector general report recently disclosed to Congress revealed that about $170 of $190 million in benefit errors favored VA claimants.

> We are convinced that good management and good government can realize the potential value of this unique VA adjudicatory system while preserving its special features — and limiting the role of lawyers.

The economic reallocations brought about by the unavoidable consequences of providing more courts and lawyers, such as removal of the fee limit, are particularly important to consider. VA benefits are capped; unlike the tort system, in which a severed limb can lead to a multimillion-dollar recovery, no veteran, however disabled by war, ever can become a millionaire on VA benefits. Particularly, in an era of restrictive budget deficits, there is little room to compensate for reallocations to attorneys' fees and the like.

The National Law Journal's cover story on June 15 gave full-throated voice to 30 loosely allied lawyer-critics it quoted but to only one lawyer-proponent of the VA system (the agency's general counsel). An academic critic warning of a "scandal of Iran-Contra proportions" buried in the VA was cited, disregarding Yale's William Nelson Cromwell professor of law, Jerry L. Mashaw, who eloquently defended the current VA system in testimony before Congress just last year. Practicing lawyers calling most of their attorney-colleagues "bargain stooges" received multiple references in the article to their allegations of the incompetence by VSO representatives.

AS FOR DAV, we would be remiss in not bringing to your attention a few facts about the only malpractice action pending against any of DAV's 250 non-lawyer officers, but one that you unfairly chose to feature on your front page. Although any comment we might make about the merits of the case could be seen as self-serving, we point out the procedural matter that the complaint was filed in state court nearly two years ago, shortly after which plaintiff's counsel withdrew without substitution. It never has been served on DAV or otherwise prosecuted since then, and appears to have been abandoned.

We seek to start the process of bringing some balance to an important public debate that has to date been substantially one-sided. We do not defend all the practices and decisions of the current system. As Justice Sandra Day O'Connor observed recently in *Bowen v. Yuckert*, 55 U.S.L.W. 4735 (June 8), with respect to the Social Security system: "Perfection in processing millions of...claims annually is impossible." But the solution to imperfection is not to add courts and lawyers when the rest of society is finding that approach less and less satisfactory.

The answer is for the leaders of the Congress, the VA and the VSOs to insist on a standard of excellence for the benefit of the nation's veterans. We are convinced that good management and good government can realize the potential value of this unique adjudicatory system while preserving its special features — a challenge that can excite the imagination of all those devoted to the rewards of public service.

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Exhibit C

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THE AMERICAN LEGION
BEFORE THE COMMITTEE ON VETERANS AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
SEPTEMBER 8, 1988

Mr. Chairman and Members of the Committee:

The American Legion is pleased to have this opportunity to speak in support of H.R. 5039, the "Veterans Reassurance Act of 1988" which was introduced on behalf of this organization on July 13, 1988 by Chairman Montgomery and the Ranking Minority Member Mr. Soloman. To both of you gentlemen, The American Legion expresses its gratitude.

For a number of years, The American Legion has been monitoring the entire adjudication process, not to mention the fact that for more than sixty years we have been assisting veterans in the development and presentation of their claims. In our judgment there are very clearly a number of chronic problems directly affecting veterans, and the Veterans Administration's ability to fulfill its mission. We have testified on numerous occasions concerning a variety of administrative and budgetary problems and their impact on the quality and timeliness of the processing of claims. Many of the problems continue to exist including the need for further improvement in due process procedures, strengthened quality control, and the persistent staffing cuts imposed on the Department of Veterans Benefits. Although this legislation does not address the staffing problem, it does propose improvements in the other troublesome areas.

Resolution No. 34 emanated from a meeting of the Veterans' Planning and Coordinating Committee which is chaired by the National Commander, and it was adopted by the National Executive Committee of The American Legion during its meeting of May 5, 1988. From Resolution No. 34 evolved the legislation we shall now discuss, H.R. 5039.

TITLE I - CLAIMS GENERALLY

Section 101 of our proposal would amend Chapter 51 of title 38, United States Code, by adding a new subsection IV which relates for the most part to the development and presentation of claims before the Veterans Administration. The new sections contained in subchapter IV are described as follows:

ADJUDICATION PROCEDURES

The measure would guarantee the right of a claimant to examine and copy relevant VA files, present witnesses and documentary evidence, present written and oral argument on the questions at issue in the case, present rebuttal evidence, and present medical opinion evidence.

Our bill further includes precedures for requesting an additional medical opinion from the VA's Chief Medical Director; and for disqualifying from considering a claim any VA employee who is demonstrably biased against the individual claimant (not merely having expressed an opinion on a general policy matter with which the claimant disagrees) and who is involved in the decisional process.

This section would basically codify currently existing VA procedure. Such codification ensures that these procedural protections cannot be arbitrarily limited by an administrative decision, but must be amended by the Congress.

NOTIFICATION OF CLAIMANTS' RIGHTS

This section would require the Veterans Administration to notify a claimant in writing of his or her rights at each stage of a claims proceeding, beginning with the initial decision that is set forth by a regional office rating board. The notification would include, at a minimum, the rights of the claimant such as a personal appearance at a hearing, representation, reopening of the claim, appeal, reconsideration of the appellate decision, presentation for administrative review, etc. In addition, the notification would include an explanation of the possible subsequent stages in the consideration of the claim.

SUBPOENAS

Under this section of H.R. 5039, the Veterans Administration would be required to issue subpoenas for witnesses or documents upon the reasonable request of a claimant. If the subpoena is issued by the VA and the subject refuses to comply, the claimant may go to U.S. District Court to seek an order requiring compliance. If the VA would refuse to issue the subpoena, the refusal could be reviewed by the Board of Veterans Appeals, but not by any court. Any witness fees pertaining to a subpoena would be paid by the

Veterans Administration.

The principal reason for subpoenas is to secure information from non-parties (third persons). Example of their use in veterans claims are private hospitals or physicians whose records may reflect treatment of a claimant, but who, as a result of fear of malpractice suits or for other reasons, are unwilling to voluntarily make the treatment records available to a rating board or the Board of Veterans Appeals.

In the case of all applications for subpoenas, whether directed to a non-party or a government agency, there would be numerous protections against abuse or harassment. To begin with, the application would be made to VA, and denial of such would not be subject to judicial review. Further, if the VA issued the subpoena, there would be no sanction for violating the subpoena unless the person on whose behalf it had been issued took the matter to the U.S. District Court, that person convinced the district judge that the subpoena was proper, and the subject of the subpoena violated the judge's order to comply with the subpoena.

The question has been raised as to whether this includes the ability to subpoena individual rating board members. Because the actions of local rating board members are quasi-judicial in nature, it is highly unlikely that district court judges would enforce subpoenas requiring them to testify as to their mental decision-making processes.

This section would also permit depositions to be taken before any notary public.

REOPENING OF CLAIMS

This section of the proposal would require reopening of a claim upon the presentation of new and material evidence from any source (not only from U.S. Government records). A denial of reopening by the VA regional office would be reviewable by the Board of Veterans Appeals.

CONFIDENTIALITY OF COMMUNICATIONS

Mr. Chairman, section 102 of H.R. 5039 relates to an issue that has not been deliberated in any previous legislation, and that is communications regarding claims. This section would amend Chapter 57 of the title by adding at the end of subchapter I a new section 3306, which defines this issue.

Claims to the Veterans Administration often involve personal and medical information of a confidential nature that should remain such, but for the fact that claimants must communicate to their representatives in order to facilitate proper handling of their claims. The society in which we live exhibits a strong interest in ensuring that those individuals with valid claims should receive their just compensation.

Therefore, the foregoing communications should receive the same degree of confidentiality as communications between attorney and client. Such exceptions to the attorney-client privilege as that for physical evidence of a crime would be exceptions to this privilege as well.

Some question the inclusion of state proceedings in this bill dealing with federal law. There is no constitutional impediment to requiring state tribunals to defer to federally granted protections such as that proposed here. For example, statements made under a federal grant of immunity from prosecution may not be used in state courts.

ATTORNEY FEES

The American Legion has for the past ten years voiced its recognition that a reasonable and responsible increase is warranted in the fee which VA claimants may be charged by private attorneys for representation in claims before the Veterans Administration. This organization considers the current $10 limitation on attorney fees to be antiquated. Therefore, section 103 of our proposal, by allowing reasonable attorneys' fees to be paid in VA claims cases, would give claimants - on an entirely voluntary basis - the right to be represented by paid lawyers.

Under this section three criteria would have to be satisfied before any lawyer could be paid for handling a claim. First, the lawyer and the claimant would have to reach an agreement permitting such fees. Second, regardless of the provisions of such a fee agreement, the fee could not exceed the greater of 25 percent of the past-due benefits or $500 ($750 if the case goes all the way through the BVA and on to the court of appeals). Third, the Administrator would have to approve the fee as reasonable.

As is currently accomplished by the courts, under the Equal Access to Justice Act, the dollar limits would be raised biennially by the VA to reflect increases in the cost-of-living. This section expressly would not limit arrangements under which a lawyer or representative is paid a salary to represent individual claimants.

LIABILITY OF REPRESENTATIVES

Mr. Chairman, the intent of section 104 of our bill has not been previously considered in any legislation that we are aware of. This section would amend section 3402 of title 38 by adding a new subsection relating to liability in connection with benefits claims.

As discussed previously, this measure would allow claimants to retain the services of paid counsel. Section 104 would make unpaid representatives liable only for actions that are intended to be detrimental to claimants. Organizations employing such representatives would be liable only if the representative were found liable and the organization had known of the misconduct in time to prevent the injury complained of.

The American Legion and other major veterans organizations handle virtually every claim they are asked to develop and present, and do so without charge. We have a wide network of service officers including community-based volunteers. Lawyers, on the other hand, often are selective about the cases they accept and the volume of cases they will handle. As was previously discussed, under this proposal lawyers would be able to receive reasonable fees for their work, and claimants therefore will have a meaningful choice between a lawyer and a service officer. In view of this fact, it would be inappropriate to hold the service organizations and their representatives to the same standards of care as paid lawyers.

RULE MAKING AND LIMITED JUDICIAL REVIEW

Section 105 of our bill relates to rule making, and limited judicial review. It would require VA rule making to conform to the Administrative Procedure Act (APA), which governs, for the most part, rule making by federal agencies. The APA requires that the public be informed of proposed rules by publication in the Federal Register and be given the chance to comment thereon.

Rules, regulations and similar orders of the Veterans Administration not issued in individual claims cases would be reviewable in the courts of appeals. Review petitions would have to be filed within 60 days after the order is made public. Review would be under the APA, and could be sought by any veterans service organization or other aggrieved person.

TITLE II - BOARD OF VETERANS APPEALS

Section 201 of H.R. 5039 would establish a Board of Veterans Appeals that is totally independent of the Veterans Administration. The new BVA would be modeled generally after the Federal Mine Safety and Health Review Commission and the Occupational Safety and Health Review Commission, which review rulings of the Labor Department and OSHA, respectively.

Mr. Chairman, The American Legion feels that it is of the utmost importance that the Board of Veterans Appeals be an independent entity, free of political, economic and budgetary constraints and not bound by the regulations, guidelines and administrative determinations of the Veterans Administration.

Under this proposal, the 65 members of the BVA would have staggered six-year terms, and would be removable only for cause. The members would be appointed by the

President with the advice and consent of the Senate. Senate review would help ensure the independence of the BVA. The Senate approves hundreds of Executive nominations, and thousands of commissioned officers' nominations, annually, and to our knowledge has not found this responsibility to impose undue burdens.

The Chairman of the Board of Veterans Appeals would be responsible for the administrative aspects of the Board's work. The Chairman and Vice Chairman would be paid at Executive Level IV instead of the Chairman's current ES-5 grade level. Members of the Board would be paid at Executive Level V instead of their current GS-15 salaries. The BVA would make an annual report to the Congress. As an independent agency within the Executive branch, the BVA would have to make budget requests through the Office of Management and Budget but not through the VA.

Section 202 of our proposal relates to the assignment of Board members and modifies slightly the mode of selecting BVA hearing panels. The modification reflects the removal of the provisions permitting the assignment of VA employees to the Board of Veterans Appeals. The purpose of this provision is obviously to ensure the independence of the BVA.

Section 203 would amend section 4003 of title 38, by making several changes in the manner in which determinations are made by the Board of Veterans Appeals. In the case of a panel where the members of a section are evenly divided on a question, the Chairman shall appoint from the other members of the Board a member to cast the deciding vote after reviewing the record. Currently the Chairman, or in his absence the Vice Chairman make such decisions.

This amended section would also set forth that the Board may, on its own motion or the motion of a claimant or accredited representative, reconsider or remand a case to correct an obvious error in the record whether or not it was presented in connection with the instant appeal, or may upon the basis of additional information, reconsider or remand its initial decision and, should reconsideration be elected, reach a different conclusion.

Before deciding whether to order reconsideration of a case, the Board would be required to furnish notice of any new or additional information proposed to be considered to the claimant and to afford the claimant the opportunity to be heard in connection with such information.

These amendments would, among other things, alleviate a problem which adversely affects the ability of veterans to have their claims fully and fairly considered. Under current regulations, the authority of the Board of Veterans Appeals to review a veteran's claim is limited to consideration of the issue or issues on appeal as certified by the regional office of jurisdiction. Our Appeals Representatives encounter instances where the claimant has in the current case or at some time in the past, raised an issue or issues that were never properly disposed of in accordance with VA law, regulation or policy either in the course of the adjudication of the claim or in the development of the appeal. If pointed out by the accredited representative or noted during the review by the Board, there is currently no provision whereby the Board may routinely assume jurisdiction of such an issue, and either dispose of it or advise the regional office of the procedural, administrative or legal error. Nor may the Board direct the regional office to take the necessary corrective action. This is particularly critical since there is currently no authority under which to inform the claimant of the existence of any error found in the case so that the individual may pursue corrective action. To The American Legion, this section would represent an important improvement in the manner in which cases are handled by the Board. Additional improvements along the same lines are included in section 205 of this bill and will be set forth in a moment.

Section 204 pertains to the jurisdiction of the Board, and to limited judicial review. It allows the Board to reopen a claim if new and material evidence is presented by the claimant, or if other good cause is shown. In such cases, the Board would be able to consider the claim itself or require the VA to do so instead.

The Board of Veterans Appeals, acting through a specially appointed 15-member panel, would be authorized to nullify any rule or regulation of the Veterans Administration that conflicts with the Constitution or federal law. The effect of any such action would be delayed for 30 days to allow the VA to seek relief from the court of appeals.

The courts of appeals would be authorized to review BVA decisions setting aside or refusing to set aside VA rules and regulations. The court would only review the propriety of the regulations, and would not review the findings of fact regarding the particular claim. That is, facts found by the Veterans Administration or Board of Veterans Appeals, and the application of the law to those facts would not be reviewable.

Under this section, a petition for review of such a BVA decision would have to be filed within 60 days following issuance of such decision. However, the BVA or the court of appeals could extend this period for up to 60 additional days. This combines several features of existing practice in the federal courts. For example, and individual planning to appeal from the district court to the court of appeals may seek an extension from the district court, while one planning to take a case from the court of appeals to the Supreme Court must seek any extension from the latter court.

Amendments to Board of Veterans Appeals procedures are set forth in section 205 of H.R. 5039. Under this section, exceptions to the Statement of the Case may be taken at any time during the course of the appeal, rather than only during the formal appeal.

The Board would be empowered to review issues evidenced in the record even if they are not set forth in the Statement of the Case or certified by the VA office of jurisdiction. The importance of this amendment is set forth in our comments on section 203 of this proposal. Claimants and their representatives have been hampered and frustrated by the inability to get the Board to recognize and act on these issues heretofore.

This section also addresses further the issue of subpoenas, whether they be requested by the claimant or the VA, and clarifies the circumstances surrounding the taking of affidavits and depositions relative to appealed cases.

The provisions relating to the resolution of medical disagreements are contained in section 206 of the bill. Under this section the Board would be required to obtain independent advisory medical opinions in cases of conflict regarding medical evidence. An example of such a disagreement is where a private physician has diagnosed the psychological problems of a veteran as post-traumatic stress disorder, but a VA examining physician has diagnosed the veteran as having a personality disorder, which is considered to be a constitutional and developmental abnormality, which is not a condition that may be considered to be service-connected by the Veterans Administration, and therefore disability compensation cannot be granted. This is not a situation that happens infrequently.

This would be accomplished through inclusion of language stating that whenever the Board finds that there exists in the evidence of record in an appeals case a substantial disagreement among the credible findings or opinions of physicians with respect to an issue material to the outcome of the case, the Board shall determine, upon due notice to all parties and their representatives, whether there is an approximate balance of evidence favoring and opposing a finding in favor of the claimant on such issue. If such a balance exists, the issue shall be determined in favor of the claimant. If such a balance does not exist, the Board shall, upon the request of the claimant, seek an advisory medical opinion through arrangements with recognized medical schools, universities or clinics.

Section 207 sets forth the authorization of appropriations for carrying out the provisions set forth in this legislation.

TITLE III - TECHNICAL AMENDMENTS

Section 301 sets forth amendments to title 5, USC, providing for the salaries of the Chairman, Vice Chairman and members of the Board.

Section 302 provides for the transfer of BVA personnel, property, records and unexpended balances of appropriations from the Veterans Administration to the United States Board of Veterans Appeals.

Mr. Chairman, The American Legion takes great pride in this far-reaching legislation which, as set forth in this statement, focuses on maintaining fairness and equity for veterans, while preserving the integrity of the Veterans Administration. It addresses improvements in due process which are extremely important to beneficiaries of the Veterans Administration, whether they be veterans, or their dependents or survivors. It sets forth provisions for an increase in attorney fees, so that the claimant has a valid choice of representation, and creates a totally independent Board of Veterans Appeals. Finally, an important provision of this measure will clarify the existing rights to limited judicial review. The American Legion has historically supported complete judicial review of VA regulations and other constitutional issues, while opposing judicial review of decisions on individual VA claims.

Mr. Chairman, we feel that H.R. 5039 is a viable and provocative approach to implementing vast improvements in the manner in which claims are adjudicated at the VA regional office level, and deliberated by the Board of Veterans Appeals.

The American Legion urges the Committee to carefully consider this measure, which, we are convinced, sets forth a reasonable and balanced approach to guaranteeing the rights of individual veterans while reserving judicial oversight for those issues potentially affecting large numbers of claimants.

Mr. Chairman, that completes our statement.

VETERANS OF FOREIGN WARS OF THE UNITED STATES

OFFICE OF THE DIRECTOR

STATEMENT OF

JAMES N. MAGILL, DIRECTOR
NATIONAL LEGISLATIVE SERVICE
VETERANS OF FOREIGN WARS OF THE UNITED STATES

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

WITH RESPECT TO

LEGISLATION PROVIDING FOR THE
VETERANS ADMINISTRATION'S ADJUDICATION PROCEDURE AND JUDICIAL REVIEW

WASHINGTON, D. C. SEPTEMBER 8, 1988

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to present the views of the Veterans of Foreign Wars of the United States with respect to H.R. 639, H.R. 5039, S. 11 and S. 2292--bills which provide for judicial review of the Veterans Administration's benefit determinations.

The issue of judicial review--allowing a veteran to take a claim to court--has been before the Congress for many years. Since the 94th Congress, proposals have been introduced to afford veterans the right to their "day in court".

The VFW is acutely aware of the fact that the VA is one of the few client agencies, one that awards monetary compensation and various other benefits to individuals, whose decisions are final with no further legal recourse available to its claimants.

However, the VFW also has long held that an unfavorable decision by the Board of Veterans Appeals (BVA) should not be subject to any type of civil action or review. It was the VFW's fear the court relief obtained by a relatively small number of claimants would have a profoundly adverse effect on the majority of veterans served by the VA because of the resultant changes in its policy, disruption in its adjudication process and introduction of the adversarial atmosphere associated with civil court proceedings.

Even so, long and careful study and review of this extremely complex issue has led to the conclusion that the VFW's responsibility to the veteran and his dependents and survivors dictates that to protect the majority, the interests of the few may no longer offer total opposition to judicial review of certain VA benefit determinations.

The VFW realizes that BVA is coming under even greater pressure to improve its timeliness in processing cases while at the same time having to contend with the increasing complexity of these cases with the introduction of radiation and herbicide exposure claims. The VFW commends BVA for still managing to render decisions which are fair and equitable for the most part. Human nature being what it is, however, errors in judgment will still on occasion be made.

The VFW has adopted a position supporting judicial review of VA benefit determinations only in instances concerning questions of law and regulation. This position is fully in keeping with the determination made by the special committee appointed in 1981 by the Commander-in-Chief of the Veterans of Foreign Wars to study and evaluate the question of judicial review. The voting delegates to the most recent National Convention has reaffirmed this longstanding position by approving Resolution No. 628, entitled "Judicial Review".

The VFW believes this carefully circumscribed position allows a proper means of redressing erroneous VA benefit determinations through the courts while not threatening to undermine the VA's own highly successful appeals mechanism. By exclusively limiting judicial review of denied VA benefit claims by the appropriate court to questions of law and regulation, the VFW believes the flood of cases into the federal court system along with a consequent impairment of BVA workings will be avoided.

This limited form of judicial review of denied veterans' claims by the court also will allow the informal and flexible review procedure currently in place within the VA to be preserved. It should be noted that the VFW's position would not call for the court to hear all cases presented to it. It is VFW conviction that the court should not become embroiled in individual benefit determinations.

If the petition to the court is not based on a question of law or regulation, then the court will refuse to hear the case, and the VA's decision would stand. This would serve also to eliminate the possibility of de novo review of VA benefit determinations which would encourage an ever-increasing number of appeals without merit.

Mr. Chairman, since the VFW is mandated by resolution to support judicial review only in cases concerning questions of law and regulation, we cannot support legislation which provides for judicial review of questions of fact in individual benefit determinations. Again, the Board of Veterans Appeals is a highly competent body and if errors of fact are alleged on appeal, the claim is remanded for clarification. If error is discovered in the appeal decision, the Board will accept the case for reconsideration. Thus, with respect to errors of fact, the claimant does get his day in court.

Mr. Chairman, the VFW believes S. 2292 more closely adheres to the mandates of our current resolution. As called for in VFW Resolution No. 628, Senator Murkowski's bill provides for judicial review of law and regulation and would not allow a challenge to a VA decision involving a question of fact. S. 2292 would also give much more independence to the VA's Board of Veterans Appeals, an action which we believe will alleviate apprehension among some veterans when having their cases presented to the BVA.

The need for the limited form of judicial review called for in VFW Resolution No. 628 is certainly apparent. There can be no doubt that no group of citizens is more deserving of access to the American judicial system when it comes to entitlements and benefits than this nation's veterans. But opening the VA adjudicatory system to unrestricted civil court review would overburden the courts and would fundamentally alter this system for the worst and ultimately harm the veteran.

Mr. Chairman, this concludes my statement. Once again, the VFW wishes to thank you for holding this hearing. As indicated, we believe S. 2292 best fulfills the requirements of our resolution and we further believe it would satisfy most members of the Congress; but, what is most important, it would best serve the veteran.

PVA
PARALYZED VETERANS
OF AMERICA
Chartered by the Congress
of the United States

STATEMENT OF
GORDON H. MANSFIELD, ASSOCIATE EXECUTIVE DIRECTOR
FOR GOVERNMENT RELATIONS
PARALYZED VETERANS OF AMERICA
BEFORE THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
CONCERNING
JUDICIAL REVIEW
SEPTEMBER 8, 1988

Mr. Chairman and Members of the Committee, it is a privilege for me to appear today to present the views of Paralyzed Veterans of America (PVA) on four bills which would, in varying degrees, authorize judicial review of certain decisions and actions made by the Veterans Administration (VA): S. 11, "The Veterans Administration Adjudication Procedure and Judicial Review Act," introduced by Senator Alan Cranston and approved by the Senate; "The Veterans Judicial Review Act," introduced by Senator Frank Murkowski; H.R. 639, "The Veterans Administration Adjudication Procedure and Judicial Review Act," introduced by Representative Lane Evans; and, H.R. 5039, "The Veterans' Reassurance Act of 1988," introduced (by request) by Representative G.V. (Sonny) Montgomery and Representative Gerald Solomon.

Mr. Chairman, of the four bills under consideration today, only Senator Cranston's bill, S.11, and Representative Evan's bill, H.R. 639, would allow an individual veteran the right to challenge a VA benefit determination in court. As such, H.R. 639 is the only legislative vehicle, introduced in the House, which generally encompasses the scope of judicial review called for in PVA's National Resolution. S. 2292 and H.R. 5039 would only authorize a mechanism for court challenges to laws governing the VA and VA rules and regulations. They would specifically preclude court review of an individual's claim in that process.

Collectively, all four bills contain certain provisions which we believe to be appropriate and necessary in the context of judicial review. At the same time, individually, they vary greatly in the scope of judicial review that would be authorized.

In summary, S. 2292, and H.R. 5039 would only authorize a mechanism for court challenges to laws governing VA rules and regulations. Both bills, however, would specifically preclude court review of an individual veteran's claim in that process. S. 11 and H.R. 639, on the other hand, would match S. 2292 and H.R. 5039 in authorizing court review of VA rules and regulations, but would go one step further and allow an individual veteran to go to court to challenge a VA action or determination with regard to his or her specific claim for benefits.

Here is where the fundamental differences between these bills should be clearly stated and understood.

> Do we merely want to make the VA, and its administrative deliberations, as an agency, accountable to the courts and the judicial process?
>
> Or, do we want to award the right to judicial review to individual aggrieved veterans seeking to challenge the VA on determinations made in the context of individual claims?

In our opinion, Mr. Chairman, and in accordance with PVA's National Resolution in support of judicial review, we should do both. But, only S. 11 and H.R. 639 conceptually encompass both goals.

By direction of PVA's Board of Directors, our organization adopted a Resolution, effective March 1, 1988, which establishes our position on judicial review. The text of this Resolution, F-88-C-2, follows:

> BE IT RESOLVED, that PVA establish as a permanent priority issue the passage of a bill awarding the right to judicial review for any veteran aggrieved by VA action or seeking benefits from the Veterans Administration.
>
> BE IT FURTHER RESOLVED, that any such judicial review Legislation prohibit findings of fact made by the VA Administrator to be subject to trial de novo by the reviewing courts, that the Legislation prohibit the issuance of a judgment that both reverses a decision of the Administrator on an issue of fact and substitutes a different percentage of a service-connected disability from that determined by the Veterans Administration; and
>
> BE IT FURTHER RESOLVED, that the Legislation direct the reviewing court to decide all relevant questions of law, interpret constitutional, statutory and regulatory provisions; compel the Administrator to act; and hold unlawful and set aside decisions, findings, and conclusions of the Administrator found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory authority; or in violation of a statutory right or procedure required by law.
>
> BE IT FURTHER RESOLVED, that the Legislation prohibit the court from addressing a matter solely on an issue of percentage rating for service-connected disability; and

> BE IT FURTHER RESOLVED, that the legislation require that when the reviewing court is presented with new evidence that such court remand the case back to the Administrator to consider such evidence.
>
> BE IT FURTHER RESOLVED, that any such judicial review could not take place until the full administrative relief through the Board of Veterans Appeals has been pursued by the veteran, and that any compensation for attorneys be limited to not more than 25% of the original award, and that attorneys would have no further claims on compensation benefits in future periods.
>
> Effective date: March, 1988.

At the same time, PVA's Board of Directors also approved Resolution, F-88-C-1 which establishes our position on the elimination of the statutory $10.00 attorney's fee limitation and recommends that the VA set fee schedules for attorneys representing veterans before the Veterans Administration.

The test of PVA's Resolution F-88-C-1 follows:

> BE IT RESOLVED, that an equitable fee schedule be established for attorneys representing veterans seeking veterans' benefits, limiting such compensation to not more than 25% of the veteran's original award, with the fee schedule to be established by the Administrator of Veterans Affairs; and
>
> BE IT FURTHER RESOLVED, that such attorneys would have no further claims on future compensation benefits.

Mr. Chairman, PVA's support for the enactment of judicial review legislation does not come from the belief that the current VA adjudication system is fatally flawed or inherently insensitive to the needs of veterans. For the most part, the VA system works well. This is not to say that we have not identified certain problems within the Administrative review process which need correction.

PVA has been concerned in recent years that due to budget cuts, severe staffing reductions, and increasing complexity of claims before the VA, the agency has become less responsive in its timeliness and accuracy in claims processing.

Mr. Chairman, mistakes do happen. At the present time, there is no accountability outside the administrative structure of the VA to provide recourse when an error or a misjudgment takes place within the claims adjudication process.

On July 14, 1988, Dr. Paul Errera, Director of the VA's Mental Health and Behavioral Sciences Service testified before the Senate Committee on Veterans' Affairs on the VA's ability to diagnose, treat and compensate Vietnam veterans suffering from post-traumatic stress disorder (PTSD). Both PVA and Members of the Senate Committee on Veterans' Affairs had addressed concerns to the VA about the wide variations in allowance rates for PTSD claims from one regional office to another. In admitting there could be a problem in uniformity of diagnosis from one VA station to another, including inconsistencies in the actual compensation examination and evaluation itself, Dr. Errera said the following:

> "I think there is a marked fluctuation/variation in the way C&P (Compensation and Pension) exams are done. I think this is not just in psychiatry. I think that the status of the C&P exams in medical centers, having remembered what it is like, is not at the top of the heap. It is not the thing we value most and have our most clinicians to do as it should be. There are times when we hire a community physician, let's say in psychiatry, at $20.00 a half an hour, to come and do C&P exams. We get what we pay for."

Judicial review, in our opinion, should not be viewed as a magic bullet which can cure all the Agency's ills or excuse shabby claims processing. Likewise, the availability of judicial review should in no way encourage or condone any action by the Congress, the VA, this Administration, or future Administrations to permit further deterioration of the quality or timeliness of the existing adjudication process.

PVA's primary support for judicial review comes from the belief that the VA in recent years has become so intransigent in the making of certain rules and regulations and so inflexible in the interpretation of rules and law with regard to individual veterans' claims, that intercession by the courts is ultimately advisable and fully warranted. We believe that judicial review is inevitable and necessary to bring full accountability to the VA in terms of both regulation and benefit determinations.

Review of Constitutionality and Law

PVA has consistently supported judicial review of constitutional questions, questions of law and regulation in VA benefit matters. All four bills would substantially clarify the court's jurisdiction in these areas which have been subject to certain inconsistencies in recent years.

Currently, the VA is not formally bound in its rulemaking process. There is no assurance that the VA follow Congressional intent when it makes a rule or issues directions for implementation of a statute. Although PVA would not want to see the Administrator stripped of his authority or discretion by the courts, veterans deserve to know that implementation of the law is in keeping with the statute and the intent of Congress.

Congressional oversight of VA rulemaking is quite often time-consuming and not necessarily fully adapted to react to the broad range of issues, both great and small, involved in the VA's design and interpretation of its own rules and regulations with regard to individual claims. Likewise, during periods of fiscal restraint, regulations can be shaped more through the influence of the Office of Management and Budget and blatant political pressure than the intent of Congress. Most often it is these decisions which deny benefits to veterans otherwise eligible under the law, either by direct constriction of the regulation, or by the outright denial of adequate funding levels for authorized programs.

PVA has seen this happen far too often in recent years. Decisions and opinions by the VA have restricted education benefits for Vietnam Era Veterans, drastically reduced beneficiary travel allowances for needy and disabled veterans seeking medical care, and jeopardized the integrity of VA insurance policies.

Just yesterday, PVA documented before this Committee well-founded reports of eligible veterans being denied their entitlement under the law for medical services and procedures. We are very concerned that none of the bills calling for modifications to the VA's appellate system, up to and including judicial review, directly address any improvement to an adequate appeals process for veterans denied medical services. All of the discussion surrounding judicial review has centered on veterans' claims being processed through the Department of Veterans' Benefits. What there is of an appellate review process within the Department of Medicine and Surgery is unclear to veterans, cumbersome and "creaky" at best. Particularly, in light of the current documented erosion in resources to cover necessary health care benefits and services for eligible veterans, we believe this Committee should thoroughly review the appellate processes within the Department of Medicine and Surgery to design a system to provide adequate recourse to the veteran community.

To cite just one example, we have seen, most cruelly, the VA denying procreative services for service-connected disabled veterans unable to have children. Although the authority clearly exists, in title 38, the VA has chosen to deny medical procedures which could grant the gift of life to certain disabled veterans and their spouses.

In each of these circumstances, the Congress has been forced to revisit these issues within the legislative process engaging in long and lengthy debate to set the VA back on the right track. In many instances, the Congress has been ultimately successful. In others, such as the case with procreative services mentioned above, the VA can still, to this day, deny otherwise eligible veterans the full range of medical services to help overcome service-connected procreative disabilities based on a skewed General Counsel's opinion on regulation.

Is the legislative process always the best place to resolve these battles over the interpretation of law and regulation? We believe it is not. The constitution provides amply for the judiciary to be the arbiter in such cases involving both institutional policy of an agency and in defense of an individual seeking redress on a specific claim, whether that be a claim for benefits or services. Veterans deserve this opportunity as well.

Three of the bills, S. 11, S. 2292 and H.R. 639, would apply certain provisions of the Administrative Procedures Act contained in Section 553 of title 5 U.S.C. to make certain that the VA would be fully accountable for the complete review of its rulemaking process up to the federal court level. We believe that formal comment, review and challenge of published agency regulations are a healthy and necessary process. The Administrative Procedures Act serves most other federal agencies well. As the VA will soon be a cabinet level department, we believe it should be bound by the same rulemaking processes as other departments of similar responsibility. H.R. 5039 does not contain this provision.

The Administrative Process and the Board of Veterans Appeals

The Board of Veterans Appeals (BVA), the final appellate body within the VA, is bound by VA regulations (Section 4004(c) title 38 U.S.C). When the BVA is confronted with a VA regulation that may be inconsistent with Congressional intent, it lacks the authority to overturn that regulation. In that sense, the final VA appellate body is helpless in its resistance to VA regulations, and the veteran claimant is stymied in his or her pursuit of adjudicative relief.

PVA supports a greater independent role for the Board of Veterans Appeals (BVA). All four bills would codify and improve appellate procedures at the BVA level, which we support. We also endorse certain provisions contained in S.11, S.2292, and H.R. 5039, which would sever many administrative ties between the BVA and the VA Administrator. Such provisions call for specific terms, Presidential appointments, and Senate confirmation for BVA members.

These actions would go a long way in providing for both the perceptional and the functional independence of the existing BVA appellate process.

At this point, the four bills part company. S. 11 and H.R. 639 would maintain the existing process and function of the BVA as an appeals board for veterans' claims under existing regulations. They would pass the right of review of VA regulations on to the courts maintaining the existing adjudicative responsibilities of the board.

On the other hand, S. 2292 and H.R. 5039 would create a "Super Board of Appeals" granting the expanded independent authority to challenge and even overrule decisions of the VA Administrator on a matter of regulation. An administrative board so empowered is rare, but not unique within the federal government. However, PVA is concerned that no matter how much ostensible independence is given to the board through its structure, or the appointment and confirmation of its members, old ties are difficult to break. We believe the perception, if not the reality, of true independent decision-making concerning VA rules and regulations on the part of the board could become somewhat strained under these circumstances.

With proper oversight and with the BVA improvements we have already endorsed, we believe that the function of the BVA should remain as it is. As provided in S. 11 and H.R. 639, the courts should be the appropriate and independent arbiter of question of VA rules, regulation, law, constitutional questions and veterans' claims. As statistics have shown, the Board of Veterans Appeals serves a vital function in the existing VA appellate process. For the vast majority of claims going through the VA adjudication system, this process works well. We do not see the necessity of completely reorganizing the existing system in order to provide for review of a few adverse decisions. The courts are already empowered by the constitution to address such determinations.

Scope of Review - Review of Fact

Mr. Chairman, as stated previously, only S. 11 and H.R. 639 would grant a veteran the opportunity to take a claim for VA benefits to court. In this regard, PVA maintains that any proposed legislation authorizing such judicial review be very specific as to the scope of review provided to the courts. Our concern stems from a need for consistency in the direction given individual courts in application of their new authority and the subsequent consistency of affected rules and regulations governed by the VA.

As we stated before, S. 2292 would invoke the judicial review procedures contained in the Administrative Procedures Act within Section 706 of Chapter 7, title 5 U.S.C. H.R. 5039 would also allow for court review of regulation. However, an individual veteran's claim would be set aside by the court in both instances and would not be part of this review process. The court could only rule on the propriety of the free-standing regulation, not the interpretation of that regulation with regard to the substance of the claims.

S. 11, and H.R. 639, in our opinion, would allow the court to address the propriety of the regulation in a much more practical manner with far greater potential benefit for the individual veteran. Both bills, specifically, prohibit trial de novo, or retrial from the start, of the facts of the veteran's case. PVA believes this bar against trial de novo to be a legislative imperative. At the same time, S. 11 and H.R. 639 would permit the court to look at the case in conjunction with the governing regulations to determine if the VA's interpretation and application of those regulations in basing its determination on the claim was valid.

If the court found the VA in error in its interpretation of regulation, it could only make the recommendation that the error be corrected. It could not actually set aside or overturn that finding at this stage of the review process. The Court's recommendation would then be remanded with the case back to the Board of Veterans Appeals for reconsideration.

The scope of review of fact in S. 11 is very narrow, but in our opinion, adequate. The court could only proceed in the review of a "material fact," one which would be deemed essential to the application of the regulation in the veteran's case. Then again, the court would only be able to review that material fact if, according to S. 11, the fact is "so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice could result if such a finding were not set aside."

H.R. 639, on the other hand, does not make such a proscription on scope of review. This legislation would basically set limits for court review of fact based solely on the standard of what the court found to be an "arbitrary or capricious" action, or "an abuse of discretion" on the part of the VA.

PVA supports the more narrow and concisely defined scope of review as contained in S. 11. We also fully support language in both bills that would prohibit the court from addressing a matter solely on an issue of percentage rating for service-connected disability or entering a judgement that influences or directs a different percentage rating for service-connected disability from that determined by the Administrator. The VA's rating schedule, from an historical perspective, has been authorized by the Congress, the legislative branch, and implemented by the Veterans Administration, the Administrative branch. PVA strongly believes that, from the standpoint of consistency, the judiciary should not be given the authority to set, readjust or challenge disability ratings.

District Court vs. Court of Appeals

In amending Section 211(a) of title 38 U.S.C., H.R. 639 would provide access to judicial review at the District Court level. S. 11 would by-pass the District Court, sending cases directly to the Court of Appeals. On review, PVA believes the Court of Appeals would be the best entry point for VA cases within the judicial system.

Despite the expressed concerns of some, we do not believe that the court system will be routinely flooded by VA cases. If the current VA Administrative review process is given the funding and support to maintain the quality and timeliness of its service, up to and including the Board of Veterans Appeals, only an extremely small number of overall VA cases will have the standing or the opportunity to be challenged in court.

Secondly, the Board of Veterans Appeals, as it is designed at the present time, serves many of the same functions as the final arbiter of a veteran's claim as the District Court would perform in providing review of similar claims. Where review and interpretation of the facts of an individual case could be of concern within the District Court system even with the very narrow scope of review provided in S. 11, the Court of Appeals would be far more concerned with the applicability of regulation. The Court of Appeals serves a more direct appellate function which would be more appropriate to receive cases once they had been thoroughly adjudicated through the existing right of appeal and reconsideration by the Board of Veterans Appeals and the VA Administrator.

Attorneys' Fees - Quality Assurance of Representation

According to the legislation, S. 11 would lift the statutory $10.00 attorney fee limitation only after the Board of Veterans Appeals has made its initial decision. S. 2292 would lift the bar after the initial Statement of the Case by the VA at the Regional Office level. But, it would only do so to allow the veteran's attorney representation to challenge regulation, separate from the claim, before the Board of Veterans Appeals and later in the courts. H.R. 639 and H.R. 5039 would waive the limitation at any point in the process.

PVA believes that attorney representation of veteran claimants, no matter at what point in the adjudication or appellate process, should receive the highest degree of scrutiny in order to control and monitor the cost to the veteran and the quality of services rendered. We have several concerns in this regard which we believe should be addressed.

Section 3404 of title 38 U.S.C., in granting the VA authority to recognize agents and attorneys representing veterans before the agency, does not actually require the Administrator to perform this responsibility. Section 3404 states:

> §3404. Recognition of agents and attorneys generally
>
> (a) The Administrator may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Veterans Administration. The Administrator may require that individuals, before being recognized under this section, show that they are of good moral character and in good repute, are qualified to render claimants valuable service, and otherwise are competent to assist claimants in presenting claims.
>
> (b) The Administrator, after notice and opportunity for a hearing, may suspend or exclude from further practice before the Veterans Administration any agent or attorney recognized under this section if the Administrator finds that such agent or attorney-
>
> (1) has engaged in any unlawful, unprofessional, or dishonest practice;
>
> (2) has been guilty of disreputable conduct;
>
> (3) is incompetent;
>
> (4) has violated or refused to comply with any of the laws administered by the Veterans Administration, or with any of the regulations or instructions governing practice before the Veterans Administration; or
>
> (5) has in any manner deceived, misled, or threatened any actual or prospective claimant.
>
> (Amended P.L. 99-576,§701(80).)

PVA believes that the loose authority implied by the use of the word "may" in this Section should be closely scrutinized to develop a proposed amendment which would require the Administrator, through the word "shall," to monitor more closely the credentials and performance of attorneys who would be new to, and unfamiliar with, the VA's adjudication process and the true needs of veterans.

PVA believes that proper certification should not only be limited to attorneys, but should be applied uniformly to anyone representing veterans before the VA or working on their behalf. This review and certification should apply to veterans' service officers as well as agency employees. This opportunity could go a long way in maintaining quality assurance by enforcing standards which ensure that all representatives operate from the same base of knowledge concerning veterans' programs, needs, and concerns.

Additionally, such scrutiny should not be applied only upon initial accreditation of the individual, but should be routinely implemented to ensure quality representation at all stages of the adjudication process.

Attorney Fee Limitation

All four bills would set similar limitations on attorney's fees and would limit contingency fees for attorneys to 25% of past due benefits in an award. PVA believes these limitations are necessary and appropriate. We believe, however, that the VA should have additional authority and responsibility to monitor and set appropriate fee schedules in accordance with other statutes to ensure that attorney compensation properly reflects the work product provided by the attorney.

Test Period for Judicial Review Authorization and Retroactivity

S. 11, but not the other three bills, would establish a five-year test period for the authorization allowing veterans access to judicial review. Enactment of judicial review legislation would be breaking new ground. PVA believes it would be totally appropriate to provide this initial five-year period of implementation to allow the Congress and the veteran community a point-in-time to stop, evaluate and modify the authorization, if necessary, to best meet the needs of the veteran community.

PVA supports the provision in Section 502 of S. 11 which addresses the question of retroactivity of cases for appeal by stating that court review of claims could only be instituted to review decisions of the Board of Veterans Appeals rendered on or after April, 1, 1987.

Additional Concerns

The authorization of judicial review of veterans' claims, rules and regulations governed by the VA provides the opportunity to address and re-evaluate many aspects of quality in the provision of the entire gamut of veterans' benefits and services.

As stated previously, the scope of judicial review and appellate reform in all the bills before us today is directed primarily at the Board of Veterans Appeals and the courts. The primary focus, again, is considered by many to fall only on the review of benefit determination, such as compensation, pension, education benefits, etc. If, as PVA supports, the Congress is to expand due process for veterans in this fashion and encourage additional accountability for the VA before the courts, there are other areas of VA responsibility which should be addressed, either in the context of this legislation or certainly in a collateral fashion by the Congress.

1) Veterans organizations, including PVA, have had difficulty in challenging VA regulations in court on behalf of their membership and all veterans. While certain courts have ruled that associations do have this right as representatives of their membership, the law is far from clear on this point. Veterans Service Organizations, chartered by the Congress, have an exceptional responsibility in that they represent not only their own membership, but the veteran community at large. Section 105 of

H.R. 5039 does include veterans service organizations in the definition "aggrieved persons" eligible to petition the courts. PVA strongly supports this provision along with language in the bill which defines liability for veterans' service organizations representing veterans before the VA and the courts.

2) PVA, over the past two years, in the course of working with other veterans' service organizations to develop the Independent Budget for the Veterans Administration, has identified a major area of the VA's benefit and service delivery system which affords the veteran little or no formal appellate rights or specific appeals processes: The Department of Medicine and Surgery.

Revised eligibility criteria mandated by the Congress through Public Law 99-272 and P.L. 100-322 have, for the first time, established definitive entitlement for certain health care services provided by the VA. We have identified certain areas in the provision of that care, however, where the VA is routinely denying access or rationing treatment to otherwise eligible veterans. At present, veterans have very little access to a recognizable process through which they can appeal these decisions.

We have testified before this Committee many times previously, and as recently as yesterday, citing examples of three general types of health care access denial as follows:

1) Local denial of approval for expensive elective surgery due entirely to inadequate dollar resources. The example given during

the Independent Budget telephone survey was total hip replacements. It may well be, therefore, that local restrictions are applied to other costly hospital procedures.

2) Denial of telephone requests from private hospitals for transfer of costly long term hospital care Category A veteran patients to VA hospitals.

3) Restricted access to outpatient care for NSC veterans whose ambulatory care would obviate the later need for hospitalization.

The revised entitlement specified in P.L. 99-272 clearly mandates the right to inpatient care by the VA for all Category A veterans. Therefore, the above examples 1 and 2 are violations of statute. Example 3, however, becomes a matter of professional judgement regarding proper interpretation of the "obviate clause," although it appears the pressure for cost containment has often replaced professional judgement in this decision making. The answer to this latter problem lies in legislative action to grant categorical entitlement for ambulatory care to certain additional Category A patients, which was agreed to recently by House and Senate Veterans' Affairs Committee Conferees in H.R. 2616.

Examples 1 and 2, above, are forms of rationing on a completely arbitrary and inequitable basis. With the aging of America and the continued escalation of health care costs, rationing may yet be legislated. However, at present, rationing is not authorized under Category A for the Veterans Administration. Meanwhile, it is not unreasonable for a veteran who is denied a health care benefit, to which clear entitlement exists, to have an appeal process no less effective than any review process provided for VA compensation claims. It is also not unreasonable to require the Department of Medicine and Surgery to establish an Administrative appellate review process which could address in a timely fashion the concerns of veterans denied access to medical care.

It may be argued that resorting to judicial review for this purpose would, unfortunately, put the veteran patient in an adversary position with his physician, delay the onset of the requested treatment and impose upon the court the responsibility for exercising professional medical judgement. The latter circumstance is no different than what exists in malpractice suits. The adversary aspect can be circumvented by referral of the patient to another VA hospital not involved in the original denial. The delay factor would not be critical in the case of elective procedures. Delayed authorization is certainly to be preferred to an unchallengeable denial of legitimate access to VA medical care.

Finally, the very presence of such an appeal option would serve to discourage arbitrary rationing of health care benefits under Category A entitlement and would provide the Committee a new and important mechanism by which it could monitor how, and if, the VA is providing health care in accordance with the law.

Medical benefits, in this regard, should be clearly defined and specified to include not only medical and surgical care, but such adjuncts as prostheses and adaptive equipment.

S. 11 does not contain specific language addressing a health care appeals process. But, the report on the bill filed by the Committee does refer to this problem area. We hope this Committee could address this major gap in due process for veterans seeking health care benefits required by law from the VA.

Mr. Chairman, PVA believes we have an opportunity to do here both what is right and what best serves our nation's veterans. In analyzing the differences and variations in the four bills before the Committee today, two bills, S. 11, introduced by Senator Cranston, and H.R. 639, introduced by Representative Evans, come close to matching PVA's National Resolution in support of judicial review of veterans' claims and VA regulations. On balance, S. 11 has had the opportunity to be more fully reviewed and updated through the legislative process addressing many of PVA's concerns. For this reason we strongly endorse and support passage of S. 11 in this Committee and in the House of Representatives.

Mr. Chairman, this concludes our testimony. PVA supports the authorization of judicial review for veterans' claims, VA rules and regulations. We look forward to working with you and this Committee to ensure enactment of appropriate legislation to accomplish that goal. I will be happy to answer any questions you might have.

STATEMENT OF

VIETNAM VETERANS OF AMERICA, INC.

Presented By

RICHARD E. O'DELL
VICE PRESIDENT

and

CHAIRMAN OF VVA'S
COMMITTEE ON ADVOCACY

and

PAUL S. EGAN
LEGISLATIVE DIRECTOR

before the

HOUSE COMMITTEE ON VETERANS AFFAIRS

on

JUDICIAL REVIEW

SEPTEMBER 8, 1988

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I. INTRODUCTION

Mr. Chairman and members of the Committee, the Vietnam Veterans of America, Inc. (VVA) appreciates the opportunity to present its views on legislation to authorize judicial review of claims adversely adjudicated by the Veterans Administration (VA). Our position on judicial review is not only well known to this Committee, but to anyone having been associated with the conduct of veterans affairs either in or out of the Congress. For many years the VVA has believed, perhaps naively, that this matter could be resolved on the force of the best arguments brought to bear on the issue.

Over the course of the nearly ten years of debate on this subject, five successive bills have been passed by the Senate, the most recent of which was passed July 11. Over the history of this issue the legislation passed by the Senate has gone through a painstaking metamorphosis. Adjustments have been made to accommodate what most were led to believe were the legitimate concerns of the other veterans service organizations. Yet, as was vividly demonstrated in 1986 when the House Committee on Veterans Affairs held hearings on the subject of judicial review, almost all of the other veterans groups opposed judicial review in any shape or form whatsoever by transparently airing their opposition to the specific bill, HR. 585, under consideration at that time. This adjustment of stance, from that of expressing legitimate concern to the Senate Committee in the spirit of constructiveness to one of expressing outright opposition, however facilely, to any and all forms of judicial review to the House Committee, constitutes a public demonstration of disingenuousness that ought not to be missed as the debate over this issue is joined once again this year on the House side of Capitol Hill. This is especially true given the recent support of the DAV and the VFW for legislation very recently introduced by Senator Murkowski, S. 2292.

For one or two of these organizations, the performance on the House side in 1986 revealed an agenda on judicial review that has probably existed since this matter first surfaced. For others, national resolutions approved by respective national conventions and policy-making bodies were either overturned or ignored. In one instance an organization was compelled to withdraw a statement supporting judicial review under threats of reprisal against the group's other legislative goals. The VA itself circulated a memorandum suggesting to the other veterans groups that free office space and telephone service might cease if judicial review were enacted.

Mr. Chairman, on January 6, 1987 when Senator Cranston introduced S. 11 he stated that, "I do not believe finding fault with the current system is a necessary step in making the case for judicial review. Rather, I believe the appropriate first question is whether there is any continuing reason ... for denying veterans the same right or access to court review of VA benefits decisions that is available in the case of virtually every other Federal benefit." By now it ought to be clear that his first question has been answered repeatedly and unassailably. In response, recalcitrant opponents have resorted to all manner of distortion, innuendo and, in some instances, intimidation in order to prevent enactment of judicial review. That being so, it is now time to address not only the question of why judicial review should be made available but also the question of what is wrong with the current system of benefits adjudication.

Since 1986, the VVA has learned a great deal about the way the VA administers its adjudicative functions at Regional Offices (RO) and at the Board of Veterans Appeals (BVA). In 1986 we expressed the view that the VA's system of providing benefits was basically sound but the inevitable mistakes must be allowed to be corrected by the courts. In light of the VA's Compensation and Pension Service handling of its responsibilities prior to and during the NARS trial, these sympathies can no longer be expressed. Given what we have learned about operations at the "Supreme Court" of VA appellate adjudications -- the BVA -- we have come to conclude that veterans pursuing their claims are forced to do so by relying on an adjudicative environment so fundamentally flawed and institutionally corrupt, that no amount of gerry-rigging in the absence of judicial review will be sufficient to assure fairness.

Even as the VA and the older veterans organizations lobbied hard for elevation of the VA to Cabinet rank, officials of the agency have demonstrated over and over again in Congressional Committee testimony that they are unwilling to be accountable to anyone. Employees within the agency coming forth with information verifying the worst suspicions about agency abuses are harassed, demoted and forced to retire. The most recent public spectacle of intimidation, in this connection, occurred on March 28 of this year at a hearing held by the Senate Governmental Affairs Committee. In responding to a question by Chairman Glenn, the VA's Chief Benefits Director stated that the VA's error rate in claims was one percent. Pursuing the issue further, Chairman Glenn pressed the Director of VA's Statistical Quality Assurance program, who was standing in the back of the hearing room, for an answer to the same question. A visibly shaken individual -- the man in charge of statistical quality measurement -- stumbled verbally before stating that he was not in a position to answer the question.

At an earlier hearing in February the Chief Benefits Director told a House Government Operations Subcommittee that the VA doesn't keep statistics on "regional" errors. Documents provided to VVA on error rates in compensation and pension claims clearly demonstrate that the VA does maintain such statistics and that the overall compensation and pension error rate is significantly higher than one percent. In fact, two days following the March 28 Governmental Affairs Committee hearing, we received these documents from an anonymous employee at the VA. Between October 1 and December 31 of 1987 the RO in Los Angeles, for example, had a substantive error rate of 21.2 percent.

For all of Fiscal Year 1987, the LA Regional Office had a substantive error rate of 19.5 percent. In this regard it should be noted, perhaps not surprisingly, that of all Regional Offices the Los Angeles office ranks number five in the nation in claims remanded by the BVA. In any event, the claim of a one percent error rate is soundly contradicted by the overall statistical data on regional compensation and pension claims made available anonymously to the VVA. Perhaps the Chief Benefits Director is referring to an error rate in some other category. Whatever other category he may be referring to, we find it hard to believe it would be more significant than in the category of compensation and pension.

For those who defend opposition to judicial review by pointing to the agency claims process as non-adversarial, the recent well known demotion and subsequent reprimand of BVA Board member Ernest Wright needs some explaining. Mr. Wright responded to media coverage of an October 6, 1987 House Veterans Affairs Subcommittee hearing on the BVA by contacting key players on the Hill with information substantially verifying the charges made by the VVA of systemic unfairness to veterans at the BVA. Mr. Wright was subsequently demoted for alleged deficiencies in both claims production quality and quantity. Apart from the fact that this is the first time in the history of the BVA that a Chief Board member has ever been demoted to Associate member, Board members are exempt from quality evaluations. We are advised, however, that this demotion was done with the advance concurrence of the Administrator.

Even though the Board members are supposed to be exempt from quality assessment they are subject to quantitive production assessments. This might serve as a legitimate reason for demotion except for one striking fact. Beginning in 1982, the BVA was exempted by Executive Exemption from the Merit Pay System prescribed under Chapter 54 of Title 5 for the specific reason that maintaining Board independence might be compromised if there were any appearance that decisions could be influenced by salary increases. With this in mind, it should be remembered that production statistics have been maintained at the BVA for purposes, among others, of awarding year-end bonuses to Board members exceeding production quotas.

In 1985 the BVA was again provided with an Executive Exemption from Title 5. In this instance the exemption was from the Performance Management and Recognition System. Once again the purpose was to assure the BVA's independence and to shield the Board from the appearance of improper decision-making based on performance evaluations.

Moreover, it would appear that if the BVA, by two Executive Exemptions, is intended to be free from performance evaluations, the existence of production quotas and the now suspended use of year-end bonuses have and continues to constitute what appears to be a violation of law. For Mr. Wright to have been demoted on the basis of either qualitative or quantitative deficiencies with the Administrator's concurrence is , in our view, a patent example of employee intimidation and constitutes yet another instance in which the agency deliberately places itself above the law.

Mr. Wright's demotion was followed by a reprimand. We are advised that the reason given was his contact of a veteran whose claim has been, in Wright's view, unfairly denied. Presumably, Wright was attempting to advise the claimant on the further pursuit of his claim. Under the circumstances, how can it be said that the VA assists veterans in the development of their claims, that reasonable doubt is resolved in favor of the veteran or that agency adjudications are non-adversarial when a BVA employee is reprimanded for attempting to provide those very services?

II. BVA DEFICIENCIES

In addressing the issue of judicial review, as already stated, we believe it is fundamentally important to note that the VA is functioning poorly in its handling of veterans claims. Since September of last year the VVA has focused a great deal of attention on this issue with particular attention having been paid to the BVA.

First of all there are variances in decision-making by Board sections on claims that are not only similar but even, as acknowledged by the BVA Chairman in 1985 and again last October, "equal and identical". The Chairman has stated that he finds no particular problem with this, however, because Board sections as well as Board members are supposed to be independent in their decision-making. We believe this practice to be in violation of 38 CFR 3.101. Even if not, we find this inconsistent decision-making phenomenon to be indefensible for any final arbiter of disputes, either adjudicative or judicial.

Along with variances in decisions, there are also variances among sections in allowances, denials and remand rates. The reasons for this may be several but we have learned that some sections and some Board members are known within the BVA, and by the BVA Chairman, to be "denial prone".

Production quotas are the dominating influence at the BVA. Nearly every aspect of operations at the BVA is colored by the requirement to meet production quotas. Stemming from production quotas, extra-regulatory and extra-legal devices have been created informally to accommodate production goals.

The most significant of these production-facilitating devices is the widespread use of "courtesy signatures." This is the practice by many Board members of signing a decision vote in a case without reading any part of the file whatsoever as a courtesy to another Board member or section. Under current statutory guidelines the Board sections, consisting of three members each, are required to share in the development of decisions on appellate claims. Contrary to express requirements of Congress, in practice the BVA decisions are developed by one or two section members and courtesy signatures are given by one or two of the other section members who do not even read any part of the record. This practice denies the veteran of any hope for a dissenting BVA member's opinion and, consequently, any hope for an expanded panel. A variation on this occurs when section members go outside of their own section to secure one or two courtesy signatures from another section.

Indeed, a retired Chief BVA section member filed a sworn statement in connection with the VVA's lawsuit. In that Affidavit, Daniel J. Bierman states that among other practices established at the BVA are "the establishment of an arbitrary quota of decisions for each section and the granting or withholding of cash bonus awards based on the number of decisions of a majority of panel members by so-called administrative allowances, which was challenged in a specific case by a memorandum signed by 38 BVA members including myself dated January 29, 1987; the manipulation by the Chairman of the assignment of cases and the expansion of panels to influence the outcome of cases; and the promotion of 'courtesy signatures' to artificially increase the production of decisions by individual sections."

Remands are another device for production enhancement. The practice we refer to here has occurred when sections have been either behind quota goals or were attempting to win year-end bonuses. Under the circumstances, cases were and may still continue to be remanded back to the originating Regional Office because it takes very little time to remand a case. Importantly, when this is done the same production credit is awarded as would have been the case if the time had been taken to decide the case. This hurts the veteran because the final decision is unnecessarily delayed, in some cases up to two years.

Quality and thoroughness under production quotas are obviously affected. Retired Board member Bierman testified before a House Government Operations Subcommittee last February that sections exceeding 100 cases per week expend an average, according to his calculations, of eight minutes per claim. He stated under oath in his Affidavit regarding the VVA lawsuit that "BVA Chairman Eaton bases the awarding of cash bonuses primarily, if not exclusively, on individual BVA members' production of cases, without regard to factors such as length of time necessary to adequately consider particular claims, the complexity of the medicolegal issues involved in various types of claims, and the thoroughness (or lack thereof) with which individual claims are evaluated.

"The quota production system and the cash bonus system create significant disincentives to full and fair review of claims for veterans' benefits. For example, a BVA section which produces a quota of 40 decisions per week can theoretically spend one hour for each case. Along with other BVA members, I have found that consideration of the medicolegal issues in a typical appeal often cannot be adequately and fairly completed within one hour. "Despite this fact, Chairman Eaton had direct knowledge of a section administered by former Section Chief Phil Wright that on a number of occasions processed at least 100 cases per week. Other sections also processed cases far in excess of the quota in order to be eligible for cash bonuses. Obviously, if a section processes in excess of 40 cases per week, its members are devoting an inadequate amount of time for case review. No human being can review a case properly under these circumstances. It follows that this practice denies claimants due process." (emphasis added)

Year-end bonuses were available to Board members who exceeded production goals, until very recently. These bonuses were suspended after the VVA filed a law suit. The availability of these bonuses most certainly spurred production while simultaneously detracting from quality and thoroughness. As discussed in the introduction, this practice seems to us to constitute a violation of at least one and possibly two Executive Exemptions issued since 1982.

One of the more egregious aberrations resulting from availability of bonuses has been the holding back of decisions for months at a time. Under the bonus system in effect for many years until recently, Board members were eligible to receive bonuses every other year. For some Board members having received a bonus one year, claims decisions were withheld until the next available bonus eligibility year. This meant unnecessary delays in the rendering of final decisions for some veterans of up to 12 months. Those who argue against judicial review on the basis of long delays in court decision-making, should take note of this particularly insidious BVA practice. When this practice was used, the intention was usually to get a substantial jump on established production goals during the bonus eligibility year. Incredibly, the BVA Chairman continues to insist that bonuses are needed and that he is considering options to replace the bonuses.

III. JUDICIAL REVIEW

From welfare and social security recipients to illegal aliens, and even military personnel, access to the American system of justice in disputes with the government is taken for granted. We feel that it is, in fact, more incumbent upon opponents to convince this committee that this right should be denied to American veterans than it is upon us to make the case to grant equal access to the courts.

Nevertheless, the testimony we present today will make a convincing case for granting judicial review of Veterans Administration claims. In the process of making this case, we believe that we have already fully addressed the major arguments of opponents.

A. Judicial Review Is Needed Because America's Veterans Deserve It

Our American form of republican democratic government is based on a system of checks and balances implemented through three coequal branches of government: legislative, executive, and judicial. The creation of the checks and balances by our founding fathers did not reflect a judgment by these men that any particular evil lurked in any of the institutions they had created. To the contrary, it was a measure to ensure a fair and judicious system of government answerable to the people, respectful of their rights, and offering individual Americans alternative avenues of relief should one branch of government be unresponsive to their petitions.

In this system, one important role of the judicial branch is to resolve disputes between the executive branch and individual Americans. This role is vital because, although Congress has the authority to check some executive action (by oversight of the agency in the VA situation), the judiciary is essentially the only check on executive authority as it affects a specific action on an individual citizen. This check is simply part of the structure of our system of government designed to protect the privileges which are the birthright of every American.

To fully appreciate why court review of VA decisions is needed requires an understanding of how Congress has generally followed the founding father's vision in the context of federal administrative agencies. The current statutory bar to court review of VA decisions came into existence in 1933 when there were very few federal agencies other than the VA. Since that time the federal government has grown tremendously and Congress has created numerous federal programs and agencies. Almost without exception, Congress has provided citizens access to the courts to resolve the disputes that inevitably arise between the agencies and the parties who appear before them.

Thus, persons who are denied food stamps, SSI, medicaid, AFDC benefits, as well as prisoners and those threatened with deportation, are all entitled to their day in court. Even military personnel can obtain court review of the numerous disputes that arise between soldiers and the military departments -- including issues like promotions, performance evaluations, retirement benefits, disability decisions, and criminal punishments.1/

The root reason that Congress has provided federal court review in all these situations is simply that no agency should be allowed to make decisions unchecked. This is not just because agencies inevitably make mistakes by interpreting the law improperly or improperly interpreting or weighing the evidence before them. And it is not just because agencies are inevitably subject to political pressures in administering their programs. Congress has provided time and time again for review by an independent federal judiciary which is appointed for life because, aside from any problems in agency decision-making, Americans have a right to their day in court. Americans have the right to benefit from the system of checks and balances bequeathed them by those who founded our nation. In this connection, even the hiring practices of the CIA are subject to judicial review.

The customary justification for allowing courts to review a federal agency's decisions is therefore not based on any judgment that the agency is more prone to make erroneous decisions than other agencies (the possible exception being the VA). The fact that courts are authorized to review decisions of the Immigration and Naturalization Service, the Social Security Administration, the Merit Pay System Protection Board, the Board for Correction of Military Records, and almost every other federal agency is not attributable to a Congressional judgment that these agencies are not competent or effective. It is due rather to the rule of law and system of checks and balances which underlies our federal system.

B. Judicial Review is Widely Supported For Many Reasons

The VA is one of the largest federal agencies in terms of the amount of money it provides in public assistance. In fiscal year 1987, nearly $15 billion was given by the VA to over 4 million veterans and their dependents in compensation, pension, educational and other benefits. The Board of Veterans Appeals annually reviews over 40,000 claims under these programs and regularly approves approximately 13% of all claims.

It is plain that compensation, pension and educational assistance benefits are often critical to veterans and their dependents. They are basic components of the safety net of millions of those who served our country honorably. Yet, under the current Section 211(a) of Title 38, all of the VA decisions in these areas are barred from court review.

At the last House and Senate hearings on judicial review prior to 1986, every veterans organization which testified -- except for the American Legion -- supported some form of judicial review of VA decision-making. The supporters included the Veterans of Foreign Wars, the Disabled American Veterans, the Paralyzed Veterans of America, the Jewish War Veterans of the U.S., the National Association of Atomic Veterans, the Retired Officers Association, the American Veterans Committee, and Veterans Due Process. Below are some of the reasons VVA and the other organizations felt that judicial review is needed.

1. VA Errors

Although the need for judicial review does not necessarily hinge on VA errors, it is beyond dispute that the VA too frequently makes erroneous decisions. Recent oversight hearings of the BVA makes this clear. For example, the following exchange took place during these hearings between Congressman Applegate and Kenneth Eaton, Chairman of the Board of Veterans Appeals;

Mr. Applegate:

Later on we will be receiving a comment from a witness about allowance rates from the various sections of the [BVA], and that perhaps some panels have consistently lower allowance rates than others ..... Have you observed this and, if you have, do you have any comments about it.

Mr. Eaton:

Yes, indeed, it is quite true that there is what I might say is a significant variance between different sections of the Board and how they see these cases .... There are a couple of sections, or Board members, I suppose, who are rather low in their allowances. But, you know, you can't tell them what to do...

Mr. Applegate:

You can have equal cases, identical, where one will get more than the others,

Mr. Eaton:

I'm afraid so.2/

Also at these BVA oversight hearings, the American Legion testified that

As an important part of our involvement with the issue of veterans suffering from post-traumatic stress disorder (PTSD), we have given special attention to reviewing the decisions of the Board of Veterans Appeals involving claims for service connection or an increased rating for PTSD. There have emerged from this on-going review several problems which have been brought to the attention of the Chairman of the Board of Appeals and other VA officials without satisfactory resolution,

In our judgment too many valid claims are being denied by the regional offices, and the denials are subsequently confirmed by the Board of Veterans Appeals.3/

VVA has observed this problem as well.

The Veterans of Foreign Wars, in testifying for judicial review has focused on wrongly refused claims and the sense of unfairness veterans feel in being denied judicial review;

1. There are those who believe a system which permits Welfare or Supplemental Security Income recipients to seek court relief but denies the same forum to veterans is flawed.
2. Many Vietnam veterans are aware that the Veterans Administration, in concert with the President's Office of Management and Budget, attempted in 1973 to rewrite the rating schedule to their disadvantage, believe the VA has been insensitive to their needs and are disenchanted believing they have not received timely, full, fair and impartial consideration of their appeals. Claims of older veterans are often viewed with a jaundiced eye simply because they deferred filing. In the absence of substantiating service medical records "buddy statements" by former prisoners of war and other knowledgeable witnesses are nearly always discounted as having been made from "remote memory."

3. One of the most frequently heard complaints by our national officers in their travels is the complete frustration of those whose claims have been denied and due to the finality statute of 38 USC 211(a) are foreclosed from redress through court action.

4. Many service officers are increasingly disappointed in the denial of cases which they believe have considerable merit. Also, they wonder why over the past eight years the percentage of cases allowed by the Board of Veterans Appeals has fluctuated only a little over two percent whether that body considered 25,000 cases in the year or more than 35,000 cases.4/

2. Legal Expertise

One attraction of judicial review is that it would afford the veteran an opportunity to have some of the many legal decisions made by the VA reviewed in a forum well suited for deciding such questions. The need for such review can be seen by examining the role currently played by agency lawyers in the VA adjudication process.

Lawyers are an integral part of any VA adjudication. They are sometimes involved at the Regional Office level and are intensely involved at the appeals level.

Although the VA's handling of a claim's adjudication is dominated by lawyers, the veteran's representative is rarely similarly qualified. Also, VA attorneys plainly do not have the qualifications of a federal judge in interpreting the law. The VVA submits that a legal process that requires the VA's own lawyers to exercise "a high order of original and creative endeavor based on extensive research of the most complex legal and medical problems" is precisely the sort of process that should be subject to independent court review (see attorney job description attached as Appendix A).

a. Lawyers Are Presently Within The System

Those who assume that lawyers will harm the veterans benefit system overlook the fact that the VA process is already rife with lawyers -- they're just not there to serve as the veterans representation. The Board of Veterans Appeals has 189 attorneys as members and staff advisers. The Office of General Counsel, which plays an integral role in promulgating binding opinions of law, has hundreds of lawyers in the Central Office and in the field.

VVA provides lawyer or lawyer supervised counsel to represent claimants in their BVA cases, and Legal Aid/Legal Services have often provided lawyers and paralegals to assist veterans benefits claimants. The Oregon Legislature, seeing lawyers as a positive addition to the system, has appropriated money to hire lawyers to represent veterans in VA claims proceedings, and the Attorney General of the State of Illinois has established a Veterans Advocacy Section. There is no discernible adverse effect to their clients. Additionally, under HR.639, lawyers will have little opportunity to change the VA process of deciding cases even if it were their inclination to do so. The bill mandates that the existing, "benefit of doubt" system be maintained. Additionally, the fee structure is simply not generous enough to prompt heavy attorney involvement except in relatively rare cases where there is the prospect of a very large retroactive award and a high likelihood of success.

b. Some Opponents of Judicial Review Do Not Understand the Role of Lawyers in the Administrative Process

The May 15, 1986 outline of the VA General Counsel's position on judicial review essentially capsulizes the notion that the role of lawyers is to somehow increase the complexity of the process:

> The length and formality of personal hearings would increase as more attorneys get involved and as VA is forced to build the record. Hearings may become protracted by extensive briefing, subpoena of treating or consulting physicians, introduction of circumstantial testimony by friends or family members, and more intensive direct- and cross-examination of witnesses.

This position paper does not comment on whether service organizations present such evidence, examine witnesses or brief cases when needed. We assume that they do. The interjection of words like "subpoena", "cross-examination", and "circumstantial" only help to obfuscate the debate by perpetrating negative stereotypes of lawyers. It is well known that no cross-examination is possible. It is not clear why judicial review would lead to more intensive direct examination of one's own witnesses.

c. The Lawyer's Role

VVA sincerely believes that allowing veterans the free choice to use lawyers and other legally trained professionals to represent them in the VA benefit system will assist rather than harm the system. There are several specific benefits we feel that legally trained advocates can add to the system. Let it be clear, however, we are not advocating the replacement of service organization service officers with lawyers. We are advocating that veterans receive the benefit of an additional option.

The most important function lawyers can serve at the VA, as they have at other federal agencies, is that of mediator between the veterans and the agency. The typical lawyer who advocates before an administrative agency does not fit the stereotypical image of adversarial trial-type litigator, the image created by some who oppose lawyer participation at the VA. Persons familiar with federal agency practice know that the role of an administrative advocate is far different from a courtroom litigator. The administrative lawyer frequently acts to explain a complex agency to a client, attempts to clarify issues for both the client and the agency, and tries to resolve claims with as little acrimony as possible.

An even more telling point against the argument that lawyers will somehow infect the system is to look at the BVA itself. As discussed above, the entire decision-making process within the VA is monopolized by attorneys. Everything is done in legalistic terms. To argue that allowing the veteran to have a lawyer will infect the process with legalism ignores the reality of the process as it now exits.

Lawyers have been trained to approach issues in a certain way, and that method is used to adjudicate issues at all federal agencies and in the courts. We have been told that the presentation of briefs to the BVA, which VVA does on almost every case, has helped the members better understand the legal issues and the factual record. Given the incredible caseload at the BVA, clarification of issues will assist the BVA and at the same time give the veteran informed access to the system in complex cases.

There is another result from the introduction of lawyers that will be beneficial to veterans and the agency. It is the benefit of a lawyer advising a client that he or she does not have a meritorious case, and this is common to all lawyer-client relationships. We have found that providing a client with frank advice about the chances of success is welcomed by the client who never before knew the real merits of the claim. Lawyers are ethically bound to so advise clients when they see no avenue for success. To do otherwise would deprive the veteran of the opportunity to seek a second opinion from a person or organization who might have a different or more novel approach to such cases. In this way, lawyer participation could significantly reduce the caseload of the agency on grounds that are sound and in a manner that leaves the client with a sense that a full and fair consideration has been given in the case by an independent professional.

d. The Question Of Fees

Another attack on lawyers involves the assumption that most lawyers will seek large fees and that the veteran will always net less than that to which he or she is entitled. Reference is made to the Agent Orange tort litigation and Social Security cases.

The Agent Orange attorneys subsidized in vast amounts the litigation which resulted in $180 million for the veteran class, significantly more than anyone else has obtained for the class. The fact that the judge cut the fee request is significant but not necessarily for the reasons cited, The judge's action in reducing the fee awards to less than ten million dollars, 5 1/2 percent of the total award, demonstrates that courts are adept at overseeing fee awards. Similar restrictions are enforced in Social Security cases at all levels.

The opponents to judicial review cannot have it both ways. First, they imply that lawyers are only interested in the veteran's money. Second, they insist the courts will be flooded. Third, they argue that the system works so well that judicial review is not needed. If the system works so well and lawyers only want money, then it is unlikely that these "money hungry" lawyers will waste their time in federal court on cases for which they will not be paid.

Arguments pointing to attorney greed are often leveled by referring the fees awarded to attorneys in Social Security benefit cases. However, a March 1987 report on this subject was issued by the Inspector General of the Department of Health and Human Services (HHS) in which the problem rested not with the attorneys but with the Administrative Law Judges (ALJ). The report issued dealt with high attorney fees during the internal appeals process of the Social Security Administration (SSA). The report does not only criticize attorneys, but rather criticizes the ALJ's and the current system of setting attorney fees and the ALJ's allowing the attorney fees to get too high.

Under present law, attorney fees are capped in much the same way we are proposing in HR.639: an agreement between client and attorney, not to exceed 25% of past due benefits and subject to approval of the presiding judge. The problem arises when the 25% of past due benefits works out to $300 or more per hour. The IG report faults the Administrative Law Judges who rubber stamp the 25% agreement between client and attorney without considering the per hour fee. The report also criticizes the current complex formula that Administrative Law Judges are supposed to use to cap fees. Both the IG report and earlier Social Security Administration reports have concluded that Administrative Law Judges rubber stamp the 25% agreements because the rules for reducing the fee are too complicated.

The IG report recommends a new approach which maintain the 25% arrangement up to $75 per hour. Allowances could be made for exceptional cases where $75 per hour is not an adequate fee, but the judge would be in a position to consider whether or not to raise the attorney's fee rather than considering whether or not to lower the fee as is currently the case. The IG is convinced this will have a dramatic impact on overpayments to attorneys. The $75 figure was arrived at based on two sources: The Equal Access to Justice Act (EAJA) and a paper issued by the Justice Department. Moreover, it doesn't necessarily follow that lawyers representing veterans would be over paid if an adjustment were made in the legal fees section of HR.639.

3. Limitations in the BVA's Power

Another problem pointing to the need for judicial review was demonstrated by the Paralyzed Veterans of America in its 1983 testimony supporting judicial review:

> The Board of Veterans Appeals lacks the independence and the authority of courts of law.... [T]he BVA is, itself, bound by VA regulations (38 U.S.C. 4004(c)). Hence, a circu[lar]ity arises when the BVA is confronted with a VA regulation that is inconsistent with congressional intent -- the Board lacks the authority to overturn that VA regulation because it, too, is bound by a VA regulation. In that sense, the final VA appellate body is helpless in its resistance to VA regulations.5/

4. Power of the General Counsel and Political Decision Making

The role of the VA's General Counsel in BVA decision-making reinforces the need for judicial review. Each year the VA's General Counsel issues dozens of legal opinions which, by statute, bind the BVA in its decision-making.6/ The VA's General Counsel is appointed by the VA Administrator and serves at his will. The VA Administrator is appointed by the President. Plainly, the VA General Counsel's view of the issues covered by his binding legal opinions is colored by the fact that he or she serves the VA Administrator. Also, how the VA General Counsel interprets a particular statute often has an impact on the VA's budget. The Paralyzed Veterans of America summarized the problem as follows:

> [J]udicial review .... should greatly help alleviate some of the problems we have seen when the Executive Branch has thwarted congressional intent. The VA has had to defy congressional intent at times in order to comply with guidelines established by the Office of Management and Budget. On many occasions in the 96th and subsequent Congresses, the Committee on Veterans Affairs have stated to the VA Administrator and to the Director of OMB that some of their rulings have not conformed to congressional intent. Yet, Congress appears more often than not to have some problem ensuring that the VA properly implements its mandates.7/

In the context of current budget restraints and the likely agenda for the VA's future budget, this problem will no doubt be exacerbated.

A federal judge who is truly independent and whose job is not affected by how he or she decides an issue is likely to view the legal issue presented from a different perspective than does the VA. This is, in fact, a federal judge's role in our constitutional system of checks and balances.

C. Judicial Review is Needed to End Discrimination Against Less Advantaged Veterans

The growing number of citizens who advocate judicial review of VA decisions often base their support on the argument that veterans should have equal access to the courts with non-veterans. The Vietnam Veterans of America believes that an important, and often overlooked, reason why Congress should authorize court review, is that the current system unfairly discriminates against the average veteran by allowing court review to many upper-income veterans, former officers, but not to the average veteran.

Little mention has been made before this Committee that there are two separate systems for providing compensation for service-related injuries. One is administered by the military departments and one by the VA. An eligible veteran must choose under which of the systems he or she will receive benefits. This decision is usually based on which system will pay benefits at a higher rate.8/

Entirely separate from the Veterans Administration program for service-connected disability benefits, the military departments have a Congressionally authorized physical disability benefit program. Like the VA program, the military departments have established agencies to review a veteran's claim for service-connected disability benefits. Unlike the VA benefit system, however, Congress has authorized court review of military disability benefit program determinations.

Congress has long authorized a system for the military departments to compensate personnel who become disabled during their military service. *See* 10 U.S.C. Section 1201, *et seq.* Basically, if a service member incurs a disability as the proximate result of performing active duty or the disability was incurred in line of duty in time of war or national emergency, and the disability is rated 30% or more, the service member is entitled to military disability retirement pay.* When a service member's disability is apparent during his or her military service, the military departments will refer the member's case to physical evaluation boards to determine whether the person should be retired for physical disability reasons. However, if the member is discharged without the disability having been reviewed by an in-service board, the veteran may still apply for these disability benefits by submitting an application to a Board for Correction of Military Records (BCMR) established pursuant to 10 U.S.C. Section 1552. *See Dzialo v. United States,* 677 F.2d 873 (Ct. Cl. 1982) ("Where a claimant ... does not know that he is ill or does not appreciate the serious character of his disability until after he has been separated from the military, application to [a Board of Correction of Military Records] becomes the [appropriate] ... administrative remedy."); Freedman v. United States, 310 F. 2d 381, 392, 402 (Ct. Cl. 1962), cert. denied, sub nom. Lipp v. United States, 373 U.S. 932 (1963).

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* The rules are more complex than this, but this is a general statement of the eligibility requirements.

In order to determine whether a veteran-claimant meets one of the primary criteria for benefits -- whether the disability is 30% or more disabling -- the BCMR uses the standard schedule for rating service-connected disability claims. And, just like the VA, in rating disabilities the military departments are required to resolve any reasonable doubt in favor of the claimant. See Rieth v. United States, 462 F. 2d 530, 536, (Ct. Cl. 1972); Cooper v. United States, 178 Ct. Cl. 277, 316 (1967).

Once a final military agency determination on a claim for physical disability retirement pay is rendered, the veteran can seek judicial review in either the United States Claims Court or a United States District Court. The veteran can challenge in court either a denial of disability benefits or a decision to rate a disability that is lower than the veteran believes is appropriate. The standard of review used by the federal courts in such cases is the familiar Administrative Procedure Act standard of whether the agency action is arbitrary or capricious, an abuse of discretion or is unsupported by substantial evidence. See Istivan v. United States, 689 F. 2d 1034, 1037 (Ct. Cl. 1982); Merson v. United States, 401 F. 2d 184, 192 (Ct. Cl. 1968); Hutter v. United States, 345 F. 2d 828 (1965). When courts review agency decisions on military disability benefit claims, there is often in the record a Veterans Administration decision on the degree of disability the veteran is suffering. The courts are not required to accept this VA determination, although they normally defer to the Veterans Administration conclusion unless there is substantial evidence to the contrary. See, e.g., Hutter v. United States, 345 F. 2d at 831.

The two systems have similarities which include the reasonable doubt rule9/ and a common rating schedule10/, but the method of calculating benefit amounts is different. Under the military system, the amount depends directly on the soldier's base pay, and thus rank, at separation (higher base pay/rank means greater benefits). Under the VA system, however, the compensation rate is the same no matter what the veteran's military pay and rank. The result is that former officers and higher ranking enlisted personnel choose the military system while average veterans choose the VA. As one authority has stated,

> Disability retirement pay from the Armed Forces and VA compensation ... are in a sense components of a single program. The service member receives compensation [from the military] for his disability .... based on pay, but the VA provides minimum compensation for those whose base pay is on the lower end of the pay spectrum. The total system provides income protection for those with higher incomes, and a minimum-level stipend for those with low incomes.11/

The greatest problem in this system is that there is no court review of VA decisions while all decisions made in the military program are subject to review by United States District Courts or the Claims Court (after administrative channels have been exhausted at the Boards for Correction of Military Records).12/ The injustice here is that the effect is to leave the courthouse door open to higher ranking personnel while shutting it on the average veteran. This is one of many examples of the unfairness perpetuated by the current bar to judicial review of VA decision-making.

D. Judicial Review is Needed to Remedy the Gross Unfairness of Allowing the VA Special Advantages When Suing Veterans, But Not Allowing Veterans to Sue the VA

Another gross injustice perpetrated by the current bar to judicial review is that the Veterans Administration can sue veterans when the VA believes the veteran owes the VA money, but when a veteran believes the VA owes him or her money, the veteran is barred from bringing suit. Each year, the VA sues tens of thousands of veterans in United States District Courts because, according to the VA, the veteran owes the VA money. Since 1980 over one quarter of a million lawsuits have been filed by the VA against veterans.

As one District Court Judge summarized the situation in his jurisdiction,

> almost half of the civil cases filed in this division [the Western Division of North Carolina] the first half of 1983 were [lawsuits filed by the government against a veteran to recover money allegedly owed to the VA]....The court is not aware of any case in which the veteran has been represented by a lawyer.13/

One of the most striking things about these cases is that the VA argues, and courts have held, that under the current bar to judicial review, veterans do not even have the right to defend themselves when the VA has sued them.14/ In other words, the judge has no choice but to rubber stamp whatever amount of money the VA says the veteran owes even if the veterans can prove conclusively that he or she does not owe the VA any money.

In sharp contrast to where the VA lays claim to a veteran's funds, when the veteran believes that the VA owes him or her money, the courts cannot even consider the claim. It is a grossly unfair system of law which would allow A to sue B, but prevent B from suing A. Under current law, however, the full power of the United States can be used to sue those who served our country honorably in time of war, but these same citizens who risked their lives to defend our country are prevented from filing a lawsuit to seek review of a decision of this same federal agency. It is high time that this injustice is corrected.

IV. THE ARGUMENTS ADVANCED BY THE OPPONENTS TO JUDICIAL REVIEW ARE NOT PERSUASIVE

A. The VA Benefit Claims Process Generally Works Well, So Why Try To Fix It

One of the arguments advanced by the people opposed to judicial review is that the VA benefit claims process generally works well, so why try to fix it. This argument, discussed in section I above, misses the point of having court review. The point is that the right to judicial review is fundamental to the system of checks and balances upon which our nation's government is based. Also, the VA makes many mistakes and federal court judges can correct these errors and make the benefit system work as it was intended to work. Additionally, judicial review can be expected to protect the veteran when the VA decision-making process becomes dominated by Office of Management and Budget directives. The recent report of the House Committee on Government Operations also, explodes the myth that the current system works well. Our lawsuit against the BVA also points to serious functional shortcomings in the operation of the BVA which acts to deny veterans of due process even under existing VA regulations.

Most federal agencies are generally fair; nevertheless, they are not, as with the VA, placed above the law. Congress has almost without exception given courts the power to correct agency mistakes. There is no good reason to treat the VA and the veterans who apply to it any differently.

B. Allowing Judicial Review Would Be Too Costly

Another argument advanced by the opponents of judicial review is that the cost of judicial review would be too great, and our already overburdened federal courts would be flooded with lawsuits. There are two independent flaws in this argument. First, it is grossly unfair to single out veterans for exclusion from the court system based upon the cost of running our government when the same cost analysis has not been used to bar prisoners, welfare recipients, illegal aliens, or military personnel from the court system. None of the latter groups are denied their day in court in order to save court costs. There is no good reason to discriminate against veterans in allocating the costs of running our government.

The second flaw in the argument about the cost of judicial review is in the estimates used. The key question is what percentage of the 35,000 to 45,000 claims denied by the Board of Veterans Appeals each year will be taken to court if judicial review is allowed. This is obviously a speculative question but, according to CBO estimates, the first year's cost of S.11 would be $2 million and in the first five years the cost would be $16 million. We see little reason to believe the cost of HR.639 would be any greater.

Apart from this an appropriate analogy for purposes of determining what the court costs will be if judicial review is allowed is judicial review of decision-making by the Board for Correction of Military Records. The BCMR administers a system very similar to the system administered by the Veterans Administration (see Appendix C). As explained in Section III-C of this testimony, the Boards for Correction of Military Records adjudicate military disability compensation claims which are similar to service-connected disability compensation applications filed with the Veterans Administration. The percentage of Board of Correction of Military Records denials that go to federal court is very small. The VVA understands that approximately 2% of all BMCR denials end up in court.

C. Allowing Judicial Review Will Change The VA Adjudicative Process Into An Adversarial One In Which The Veteran Will Not Be Given The Benefit Of Reasonable Doubt

This next argument advanced by the opponents to judicial review has no evidence to support it. There is no reason to believe in the first place that merely having court review of an agency that is set up to be non-adversarial and to give the veteran the benefit of the reasonable doubt would change if courts are allowed to review their decisions. For example, the Boards for Correction of Military Records have for decades been non-adversarial in nature. For decades, BCMR decisions have been subject to judicial review. For decades, service officers of the older veterans organizations have represented BMCR applicants. Court review has not changed the nature of the BMCR decision-making process and has not impeded representation by veterans service representatives. The opponents of judicial review have been unable to suggest otherwise.

It has been argued that court review of the BCMR has inadvertently brought about an adversarial environment. The testimony of Mr. Keith Rosenberg before the House Committee on Veterans Affairs on June 24, 1986 is the only argument of its kind that has ever been articulated as far as we know. The thrust of his remarks is that court-made rules limiting judicial review of Military Correction Board decisions have caused a backlash at these Boards which have begun to create similar Board-made rules. He also bases many of his assumptions on the misunderstanding that the VA adjudications process works well.

The VVA's lawyers have lengthy experience before the Military Correction Boards. After Mr. Rosenberg's 1986 testimony, they canvassed many members of the bar who regularly practice before the Correction Boards. Suffice it to say that Mr. Rosenberg's views are peculiar only to himself. It is also unlikely that he would use his argument to make a case against continued judicial review of Military Correction Boards. Whatever problems he is encountering at these Boards may very well be attributable to personnel changes and difficulties at the Secretarial review level. Most members of the "military law bar" would concur with this assessment. (see Appendix B for examples of letters opposing Mr. Rosenberg's position, including one from a former Executive Secretary of a Correction Board).

The argument is also flawed because two of the bills at hand, S.11 and HR.639 make statutory the requirement that the VA keep its non-adversarial system. They required, as a matter of law, that the VA give veterans the benefit of reasonable doubt. (This is not even a statutory requirement now.) They require the VA to keep its current system on re-opening claims, which is very liberal. They require, as a matter of law, the VA adjudicative process remain non-adversarial. Thus, the opponents of judicial review who argue that if S.11 or HR.639 are passed, the VA system will change to the detriment of the veterans are arguing, in effect, that the VA will violate the law. There is no basis for this belief, and the VVA views this argument as unfounded and illogical.

In fact, logic and experience suggest that Board of Veterans Appeals members will tend to hesitate before denying a veteran's claim if they know that the veteran can go to court and call the Board member's judgment into question. As it stands now, the Board of Veterans Appeals is a veteran's last resort, and Board members know that they do not have to answer to anyone for their decisions.

D. Judicial Review Would Not Improve the Quality of Justice Because Judges Are Not Better At Deciding Whether Veterans Deserve Benefits Than are the Members of the Board of Veterans Appeals

This argument is based on a misunderstanding of the two purposes of judicial review. One purpose is to correct an agency when it misinterprets the law. Correcting errors of law plainly works to improve the quality of justice. Independent federal judges have more expertise than members of the BVA in deciding what the law requires.

The second purpose of judicial review is to correct an agency when the agency's decision is contradicted by the overwhelming weight of the evidence. Long ago, courts adopted the rule that they will overrule an agency decision only if the court is sure that no reasonable person would have decided the case the way the agency did. When courts are sure of this, they call the agency decision "arbitrary and capricious." This standard of review is set forth in the

Administrative Procedure Act and it is also set forth in HR.639 which the VVA prefers.

This long-standing rule ensures that if court review of VA decisions is allowed, the quality of justice will improve. If the question of whether the VA has properly evaluated the evidence is a close one, the rules of the court require it to defer to the VA's expertise and decide against the veteran. Where the VA's decision is so lacking in support that no reasonable person would agree with it, the court decides in the veteran's favor, correcting an obvious error.

V. THE LEGISLATION

In your letter of invitation, Mr. Chairman, you asked for comment on each of the four measures that have been variously described as judicial review legislation. The terms "variously described" are used advisedly here because only two of the measures, HR.639 and S.11, are in fact judicial review bills. Neither of the other two, S.2292 and HR.5039, the latter having been introduced at the request of The American Legion, calls for judicial review. This is because neither would allow for court review of individual claims decisions. Instead, they would authorize review of VA regulations only. Since veterans already enjoy a right to court review of regulations and since the issue here is whether a veteran denied benefits should be able to get that denial of benefits reviewed in court, S.2292 and HR.5039 cannot be accurately described as providing for judicial review.

The recent Supreme Court decision in McKelvey and Traynor has put to rest any argument that veterans lack judicial review of regulations and has rendered irrelevant the judicial review of regulations provisions of S.2292 and HR.5039. In its decision, the high Court answered the question of whether or not the VA's regulation holding alcoholism to be willful misconduct constitutes a violation of the Rehabilitation Act of 1973. The Court's answer in these cases was no. Apart from any view as to the wisdom of this decision itself, if regulations were unreviewable in the courts the question of whether a VA regulation violated the Rehabilitation Act of 1973 would never have been before the Supreme Court.

A. S.2292 and HR.5039

As already stated neither of these bills would authorize court review of individual decisions. Instead of review of individual claims disputes in a court of law, each of these bills would permit court review of regulations at the Federal Circuit Court level and attorneys could be paid more than $10 in processing these appeals.

1. Circuit Court Versus District Court Review

Apart from the key defects in S.2292 and HR.5039 barring court review of individual veteran claims, there are serious problems associated with the level of court review being the Circuit Court level. The problems would be evident even if review of individual claims were permitted at this level rather than at the Federal District Court level. Indeed, even the provision of S.11 which authorizes individual claims review at the Circuit Court level is seriously flawed.

Throughout the court system there are only 12 Circuit Courts of Appeals. This shortage of available courts would make actual access for many veterans very difficult. For example, Puerto Rican and Virgin Islands veterans would have to have their cases filed in the Circuit Court in Boston, Massachusetts even though there is a U.S. District Court in San Juan.

This restriction plus the provision of S.2292 that limits the time period to 60 days within which an appeal could be brought before a Circuit Court would seriously jeopardize a veteran's chances of ever actually getting to court. The same 60 day limitation would similarly jeopardize access to the courts even if the more plentiful Federal District Courts were the first courts of jurisdiction. Added to this, S.2292 is silent on the subject of much greater court costs in the Circuit Courts by contrast with the District Courts. Moreover, the use of the Circuit Courts rather than the District Courts must be seen as onerous.

2. Availability of Attorneys

Each of these measures is also silent on the subject of attorneys. Just as there are far fewer Circuit Courts than District Courts, so too are there far fewer attorneys sufficiently credentialed to practice in the Circuit Courts. If it can be conceded that a shortage of Circuit Courts will hamper a veteran's access, it must also be conceded that a shortage of sufficiently qualified attorneys will exacerbate the problem of access to the courts.

3. BVA as a Specialty or Article I "Court"

Both measures take several steps, to a greater or lesser degree, to assure independence of the Board of Veterans Appeals. While there is superficial merit to assuming that a truly independent BVA will assure fairness in appellate decision-making which is free from political or fiscally motivated interference, even a totally independent BVA cannot be substituted for federal court review.

One of the peculiar aberrations of a more independent BVA in which only regulatory disputes may be resolved is the potential for the VA to take the BVA to court in disagreements when the BVA overrules, for example, a General Counsel's opinion. Under the circumstances, you would have a situation in which scarce VA and BVA resources are expended in a court contest the outcome of which would likely hold little benefit for the veteran.

Another superficially appealing aspect for all practical purposes of a totally independent BVA is the establishment of a specialty (Article 1) court. On closer examination, however, this type of court has several disadvantages by contrast with an Article III court such as the Federal District Court.

Over the last several weeks the VVA has heard that discussions have been undertaken to consider an Article I court option as a judicial review compromise. These may have taken place particularly in connection with HR.5039 which provides for the greatest indpendence for the BVA.

The debate over the merits of specialty courts as opposed to courts of general jurisdiction is a long-standing one, and has generated a great body of literature and studies on the question. Most of the authoritative bodies which have spoken to the question have rejected specialty courts except in the most extraordinary instances. Review of the VA, as we shall show, is clearly not one of these instances.

In a study commissioned by the Administrative Conference.15/ Professors Currie and Goodman (law professors from the University of Chicago and Pennsylvania, respectively) summarize the advantages and disadvantages of specialty courts as follows:

Advantages

(1) Relief for regular courts;
(2) Certainty in law established more quickly;
(3) Better understanding by the judges; and
(4) Reduction of forum shopping.

Disadvantages

(1) Loss of generalist perspective;
(2) Loss of diverse views and concentration of power;
(3) Quality of judges;
(4) Jurisdictional litigation; and
(5) Litigation convenience for plaintiffs

The Senate reports on bills similar to HR.639 have indicated that the notion of specialty courts had little support there and that the Senate Committee on Veterans

Affairs wished VA claimants to be in a similar posture as claimants before other federal agencies.

At the hearings16/ before the House Veterans Affairs Committee in 1983, advocates of a specialty veterans court argued that such a court would shorten the time required for the resolution of a veteran's claim for benefits, cost less than review in the district courts and provide a greater consistency in the application of the laws.

Opponents of the specialty court at the House hearings noted that such courts are easily dominated by the agency, lead to the creation of an expensive and specialized bar and the creation of special rules, and lead to greater expense and inconvenience for litigants. The Administrative Conference of the United States noted that specialty courts are generally not useful to the administrative process.

a. Expense to Plaintiffs

It is clear that the establishment of a specialized court inevitably leads to the creation of a specialized bar. As the court develops its rules and interpretations of the law, only those attorneys who practice before it on a regular basis are able to acquire the specialized knowledge needed to argue effectively in that forum. This specialized knowledge then becomes a valuable marketable resource for which the attorneys possessing it are able to charge a premium in fees. This has already happened with lawyers who practice before the specialized Court of International Trade and the Claims Court, and who charge higher fees than the average attorney in district court. Furthermore, concentrating the bar in Washington, D.C. ensures higher fees than the average national rate. The fact that the court may occasionally travel would make little difference.

There is also the question of access to a specialty court for the average veteran. Such a court would be established in Washington, D.C., and would present a burden for distant litigants required to travel to Washington, D.C. to retain counsel, meet with counsel as the case develops, and have their cases heard. Even if the specialty court is created as an occasionally traveling forum, the expense of meaningful travel is immense. Few good judges would commit to extensive travel. Litigants would undergo lengthy waiting periods until the court was in their area. Requiring veterans to travel to Washington or to wait until the specialty court travels to their area would be a serious financial and psychological burden in their pursuit of justice.

b. Undesirability of a Narrow Focus

The specialization of a court and its bar also causes too narrow a focus in a particular area of law. Over thirty years ago, writing in the ABA Journal,17/ Judge Simon Rifkind of the Southern District of New York noted that while specialization in administrative proceedings is fine, the essence of the judicial function is "a detachment from, a dispassionateness about, the activity under scrutiny. A one-function court is bad. No subject lives in the seclusion and silence of a Trappist monastery."

Much of the literature18/ on specialty courts suggests that judges in these forums tend to develop a kind of "tunnel vision." By constantly hearing similar cases without variety, these jurists are often so caught up with the nuances of the particular law they are charged with overseeing, that they lose sight of the human issues before them in a case. In the area of veterans appeals, this narrow focus would be particularly undesirable.

Additionally, it has been observed19/ that the limited sphere of interest of a specialty court and bar tends to lead to the imposition of the court's own views of policy, even where the scope of review is very limited. Specialty courts run a greater risk of being captured by special interests as well. These problems are less likely to occur with federal district court judges who have life tenure.

c. Quality of Judges

Specialty courts with exclusive jurisdiction also tend to have less incentive to thoroughness than a court which is aware that other courts will analyze similar problems. Specialty courts are generally regarded by society and the legal profession as less prestigious than generalist courts, and are therefore not as likely to attract as high a quality of judges and practitioners.

d. Generalist Courts More Closely Reflect American Ideals

It is far more in keeping with our country's democratic ideas to expect judges to examine a case in its widest perspective rather than the narrowest. In testifying before the 95th Congress,20/ Judge Rifkind observed, "The vitality of the Federal courts depends on the fact that district courts are courts of general jurisdiction, whose judges are required to deal on a daily basis, with the full range of substantive law." He further noted that "changes in one area of the law influence the development of other areas of the law. New ideas are allowed to filter through the legal system, so the law does not become stagnant."

A specialty court will necessarily be less democratic in nature than a court of broad jurisdiction. Since district court review is already provided to some veterans who challenge decisions of the military similar to claims presented to the VA, veterans with the means to employ knowledgeable attorneys can bypass either the VA or a specialty court by their claims through the military process. This discriminates strongly against the average veteran who lacks the means and the knowledge to take advantage of this alternative avenue of adjudication for his claim.

Specialty courts have a narrow focus, attract less qualified judges, tend to be more activist in the policy area despite limited scopes of review, and tend to be viewed as not independent. Because of narrow subject focus, specialty courts often do not draw on the full scope of our nation's laws to decide cases. They are so involved in the specific area of law, they turn to policy analysis and wind up micro-managing the agency they are supposed to be reviewing. A specialty court might confirm some veterans perception that review is just an extension of the Veterans Administration bureaucracy. Jurisdiction in the local federal district court will eliminate this possible perception of bias. Veterans are entitled to and should receive the same justice available to all citizens in our federal district courts.

e. Consistency And Speed of Decision-Making

Proponents of a specialty court to handle veterans claims argue that such a body would offer a greater consistency in decisions and would provide a quicker final resolution to the individual's claim. VVA is unconvinced by these arguments, and unsure that consistency within the narrow framework of a specialty court is even desirable. The law, to be just, must be flexible and open to changes in the society and in the administration of justice.

Forcing specialist lawyers to argue before generalist judges will ensure a more intelligible law, and questions will be seen in a broader context than that of the specialist's narrow concerns. Although uniformity and consistency in the law may be virtuous objectives, there is something to be said for the more thorough airing of an issue in several different courts. Serious inconsistencies can be dealt with through the regular appellate process.

Potential inconsistencies among the district dourts in their interpretation of the law regarding veterans claims could be lessened by channeling all of the appeals from the lower courts through the Court of Appeals for the Federal Circuit. As with customs and patent appeals, those from the Court of International Trade, and military pay cases (Tucker Act), veterans appeals would go before a single appellate tribunal and its decisions would be binding on all the district courts.

It is argued that a specialty court would be able to reach a final determination more expeditiously than the district courts. Even if this is true, and VVA questions this assertion, retroactive award of benefits would ensure that the veteran suffers little financial loss from the time spent in pursuing his claim in court. In addition, since specialty courts attract less qualified judges, and by extension staff and law clerks, it is unlikely that they will issue both speedy and well-reasoned decisions.

f. Judicial Economy

There is a serious question whether a specialty court with a limited subject matter jurisdiction is an efficient use of judicial resources. Is it really worth the cost to establish a court devoted solely to veterans claims, when it may well be that the caseload that develops for the court will be quite small? Some proponents of a specialty court have suggested that judicial review of VA determinations will result in a flood of new litigation, and make analogies to the judicial review of the Social Security system. VVA believes the more apt analogy is to the current review of DoD determinations in veterans cases, which generates a very small number of cases before the district courts and U.S. Claims Court.

g. Current Specialty Courts

Ten specialty federal courts are in existence today. While Congress has recognized the need for these 10 panels, each has been generally regarded as an exceptional response to an exceptional situation. Some of these panels, such as the Bankruptcy and International Trade Courts, were necessitated by a specific constitutional requirement of uniformity in a particular area of law. Others were created in the face of national emergencies, like the rail crisis or the price freeze, during which speed and uniformity of judicial decisions were deemed essential to the economic security of the country. The Foreign Intelligence Surveillance Court and

Court of Review were the only means by which judicial oversight of surveillance activities would be established without threatening basic national security, and the Court of Military Appeals was also regarded as a crucial element for national security and military discipline. (Significantly, this court has come under extreme criticism over the quality of its judges and its tendency to over manage the system it supervises. Some areas of law became so complex and technical as to be unmanageable by a generalist court, and this produced the need for specialized bodies such as the Tax Court and the Bankruptcy Court.) Finally, while having as a catalyst the economic need for uniformity in a particular area of law, the Court of Appeals for the Federal Circuit and the Claims Court were established specifically to consolidate various tasks and reduce judicial specialization.

Specialty courts have thus been acknowledged as legitimate solutions to extraordinary circumstances. In addition, they have been created in those circumstances only after the district and circuit court alternative has been examined and ruled out as a nonviable option. Finally, even when these specialty panels have been found necessary, Congress has generally refused to grant them the permanence inherent in Article III (life tenure for the judges) status. This policy has been a sound one, and based on the consistency of this Congressional attitude over the past two hundred years, it is assumed that any new specialty courts will be created only if they meet these same criteria.

Veterans benefit claims are, and will always be, largely handled by non-lawyer counsel. Thus, they cannot be so complex as to require a specialty bench and bar.

However, the Vietnam Veterans of America is committed to judicial review of Veterans Administration decisions and is convinced that review by the district courts is the proper forum. VVA believes that there will be no flood of litigation, and that cases brought would be easily absorbed into the system accessible throughout the entire country.

Traditional federal district court review will ensure a democratic process by generalist judges at a reasonable cost to both the government and the litigant. Consistency in decisions can be achieved either through the normal process of circuit court review, or to ensure a greater uniformity, through the Court of Appeals for the Federal Circuit.

4. Attorneys' Fees

The measure's provisions setting out the terms and conditions of amounts that may be paid to attorneys as compensation for representing veterans in their disputes with the BVA or in the courts are mostly unobjectionable. We agree with the provision of S.2292 allowing a mechanism for attorney's fees to be paid by the VA in cases where the VA loses the dispute. However, nowhere in S.2292 is there any provision for the appointment of counsel for indigent veterans where the VA appeals to the Court of Appeals for the Federal Circuit.

Apart from the fee structure for attorney's fees, the measure strictly limits judicial review to law and regulation. As already stated, this limited type of review is already available. In addition to this, the veteran should be allowed access to the courts when the facts of the claim are arbitrarily applied to the governing regulation. We see no good reason why a court should be permitted to find VA regulations unlawful or arbitrary while denying the courts sufficient authority to similarly decide an adverse BVA decision on a claim for benefits.

Amended section 3404(f) of Title 38 in section 4 of S.2292 states the attorney's fees may only be paid in cases involving claims for benefits under the laws administered by the VA but that these provisions "shall not apply in cases in which the Veterans Administration is the plaintiff or in which other attorney's fee statutes are applicable." This provision seems a bit ambiguous. In cases where the VA is the plaintiff and the veteran is the defendant, it is unclear whether this provision bars the veteran from securing legal assistance costing more than $10 in preparing for his or her defense. We note that under current interpretations of the law the VA prohibits payment of more than $10 to an attorney, at the administrative stage, where complex legal cases are raised in overpayments cases. This is a particular problem in some real estate foreclosure based cases.

B. HR.639 and S.11

Each of these bills authorize court review of individual claims decisions and, therefore, constitutes genuine judicial review. The level of court review where disputes would be resolved in these measures differ however. This year, for the first time, the Senate-passed measure would allow review at the Circuit Court level. In each of the last four Congresses in which the Senate passed judicial review legislation, the Federal District Courts were identified as the authorized level of entry to the courts.

The VVA advocates the District Court level for a variety of reasons set forth above and HR.639 retains this level as the appropriate avenue of access. The VVA, therefore, supports this particular provision of HR.639 over S.11.

1. The Standard of Review

The standard of review of fact in HR.639 is also greatly preferable to the standard of review contained in S.11. The standard in HR.639 holds that a VA decision may be overturned if a court finds the agency's decision to have been "arbitrary and capricious." The standard in S.11 is quite narrow. That standard would allow a court to overturn a VA benefits decision only if the agency's decision were "so utterly lacking in a rational basis in the evidence that a manifest and grevious injustice would result if such findings were not set aside."

The VVA strongly supports the standard of factual review in HR.639. Instead of the standard provided in section 2046 (d) of S.11, we would prefer the traditional and well-known "arbitrary and capricious" standard of review. This standard allows court review of issues of fact only when BVA decisions are clearly unsupported by the evidence of record. Even when the court does review an issue of fact, it is required to remand the case to the BVA for clarification of the BVA's basis for decision. In addition, HR.639's same scope of review of issues of fact will avoid the problems inherent in S.11 which will require litigation over whether an issue is one of law or fact.

The standard contained in HR.639 permits federal courts to review narrowly factual determinations of the Board of Veteran Appeals (BVA) and to overturn or remand these determinations only when they are "arbitrary and capricious." This is the common standard used by courts which review agencies under the Administrative Procedure Act. It is more narrow than the review standard under the Social Security Act. In those cases judges determine whether "substantial evidence" supports the Social Security Administration's findings. That test requires more of a weighing of the evidence.

The arbitrary and capricious test does not involve the weighing of evidence. Great deference is given to agency findings, and they are overturned only if the factual conclusion appears to be "without any basis in fact." This very narrow standard of review guards against judges substituting their view of the evidence for that of the agency being reviewed.

The best way to describe what this type of factual review will do is to look at a few general examples. One area of great concern to veterans service officers has been the issue of increasing a rating due to unemployability. Normally the veteran's representative provides sworn testimony from the veteran, family, friends, and former employers and medical evidence to demonstrate that the veteran cannot hold a job.

In many cases the Board of Veterans Appeals decision finds the veteran "employable" without discussing the facts of record or the medical evidence that supports this conclusion. In such a case, the court would properly remand the case for a factual explanation by the BVA. If the BVA could point to evidence of record to support the original decision, the decision would stand.

The Senate-passed standard of review is so narrow that representatives of the Judicial Conference testified last April before the Senate Veterans Affairs Committee that few, if any veterans, would win in court under this standard. While the Senate-passed standard is decidedly narrow, it must be clearly understood that the "arbitrary and capricious" standard contained in HR.639 is not a broad standard. The standard applied to social security recipients bringing their disputes to court is broader still than the standard contained in HR.639. That standard would allow a court to overturn an agency decision if that decision were found to be unsupported by "substantial evidence" after an independent review of all interpretations of law and an independent review of all findings of fact. Moreover, the standard set forth in HR.639 represents a legitimate compromise between the more liberal standard applied to social security recipients and the very narrow standard contained in S.11.

2. Use of Attorneys in Claims Development

Currently, a post Civil War era law bars veterans from paying an attorney for purposes of representation in benefits claims to $10. This has had the effect of depriving veterans of any meaningful access to attorneys.

Necessarily, if the $10 fee limitation is lifted either partially or completely at certain stages in the development of a claim, veterans may use attorneys for representation at differing stages of the adjudications process. The Senate-passed bill bars the lifting of the fee limitation until after the BVA renders a final decision. This means that lawyers will, for all practical purposes, be excluded from the VA adjudication process. The provisions of HR.639 would lift the fee limitation altogether. This would allow veterans access to attorneys from the time an original claim is filed up through to the final judgement of a Federal Court. Each of these bills would place a limit on the maximum amount of past due benefits an attorney could receive. The VVA supports the provisions of HR.639.

VI. PUBLIC OPINION AND JUDICIAL REVIEW

Mr. Chairman, the VVA has undertaken two opinion surveys on the subject of judicial review. The first of these was carried out by the Cambridge Survey Research organization with results reported on April 28, 1988. The results of that poll showed that of all veterans, 72 percent favor access to the courts with only 22 percent supporting reliance on the current VA system of adjudications. Of veterans under the age of 50, 89 percent supported judicial review. (see Appendix F)

Another poll the VVA undertook in conjunction with several other organizations was designed to test the perspectives of of this year's Republican delegates to the National Convention on a variety of issues. That poll, conducted by the Analysis Group and released on August 12, 1988, has an accuracy level of plus or minus 4 percent. It found that Republican National Convention delegates, most of whom described their general attitudes as conservative, supported the concept of judicial review. Fully 68 percent either favored or strongly favored judicial review and only 15 percent either opposed or strongly opposed judicial review. (see Appendix G)

Importantly, we commend to the committee's attention the description of the poll's methodology. Prior to going forward with the poll, the Analysis Group, Inc. forwarded the questions to the University of Michigan to assure that the questions were as valid and unbiased as possible.

An additional poll was conducted late last summer or early last fall by Representative Dan Mica. This particular poll was directed at constituents and contained questions on a variety of pressing issues including judicial review. The questions on judicial review was as follows: "Should the Veterans Administration be subject to judicial review oversight, as other federal agencies?" The results again were consistent with the two more recent polls conducted on behalf of the VVA. Fully 77 percent responded favorably to judicial oversight with only 23 percent opposing judicial oversight. (see Appendix H)

The results of these polls range between three and four to one in favor of judicial review. Collectively they demonstrate conclusively that the public understands access to the courts as a fundamental privilege in our Constitutionally governed republican form of democracy.

VII. CONCLUSION

In this statement we have demonstrated that judicial review is indeed warranted and long overdue. In pressing our case we have further demonstrated that the VA's apparatus of adjudications from the Regional Office up through to final decisions of the BVA is systemically flawed. With the primary motivation of claims adjudicators and appellate decision-makers monopolized by production quotas, denial of due process and by concealment of errors, it can no longer be said that the system in non-adversarial in any practical sense. Neither can it any longer be said that the system works well or that reasonable doubt is resolved in favor of the veteran. Judicial review would still be necessary to serve the demands of justice in our society even if each of these arguments against judicial review were something other than myths.

Importantly, those who would argue from a different perspective, the Judicial Conference for example, against judicial review citing overcrowded courts or the need to stem the growing judicial activism in this country must all proceed from the basic premise that the system works well and that we can therefore "hold the line" on judicial access where veterans are concerned. The proponents of these other arguments would look silly but for the fact that their limited understanding and experience with the VA's operations shelter them from understanding just how poorly served by the VA's system the veterans of this country really are.

Of all the bills under consideration by this Committee this year, only one goes far enough. That bill, which amounts to much less than the judicial access available to other federal beneficiaries such as social security recipients, for example, is HR.639.

Mr. Chairman, the veterans of this nation have been patronized long enough by a system that insists it knows better what's in the veteran's best interest. There may have been a time when another generation of veterans truly was served by an agency with the best interest of the veteran at heart. That time, however, has long since passed and today's veterans are weary of being relegated to second class citizenship.

FOOTNOTES

1/ Congress has established Boards for Correction of Military Records. 10 U.S.C. Section 1552. As the Supreme Court recently stated, these Boards provide a "means with which an aggrieved member of the military 'may correct any military record ... when [the Secretary of the military department acting through the Board] considers it necessary to correct an error or remove an injustice.'" *Chappell v. Wallace*, 103 S. Ct. 2362, 2367 (1983). These Boards resolve a wide variety of GI claims, such as promotions, performance evaluations, and fitness determinations. If the GI is unhappy with the Correction Board's decision, the Supreme Court confirmed that these "Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence." *Id.*

When a GI is convicted of a crime by a court-martial, judicial reivew is also available. The Uniform Code of Military Justice guarantees military personnel a right to review by a military court, and if the GI is not satisfied with that court's decision, he or she can get the case reviewed by a civilian judge in federal district court.

2/ *Oversight Hearing on the Operation of the Board of Veterans Appeals: Hearing Before the Subcommittee on Compensation, Pension, and Insurance of the House Committee on Veterans' Affairs*, 99th Cong., 1st Sess. 10-11 (1985) (hereinafter "*1985 House Hearings*").

3/ *Id.* at 40 (Statement of Philip R. Wilkerson, Assistant Director for Claims, National Veterans Affairs and Rehabilitation Commission, The American Legion).

4/ *Judicial Review of Veterans' Claims: Hearing Before the Subcommittee on Special Investigations of the House Committee on Veterans' Affairs*, 96th Cong., 2nd Sess. 295 (1980) (hereinafter "*1980 House Hearings*") (Statement of Donald H. Schwab, Director, National Legislative Service, Veterans of Foreign Wars of the United States).

5/ *Veterans' Administration Adjudication Procedure and Judicial Review Act and the VA's Fiscal Year 1984 Major Construction Project Proposals: Hearing Before the Senate Committee on Veterans' Affairs*, 98th Cong., 1st Sess. 315 (1983) (hereinafter "*1983 Senate Hearings*") (Statement of R. Jack Powell, Executive Director, Paralyzed Veterans of America).

6/ 38 U.S.C. Section 4004(c)(1982).

7/ *1983 Senate Hearings* at 312.

8/ In his 1983 testimony before a subcommittee of the House Committee on the Judiciary, B. Wayne Vance of the Department of Justice stated:

> The present scheme has two tracks or tiers. First, Congress has established a comprehensive disability retirement system for service members permanently injured in the line of duty. See 10 U.S.C. Section 1201 and 1401. Moreover, should a service member leave their service without seeking disability retirement, he or she may later request it. For example, Section 1552 of Title 10, United States Code provides that the Secretary of [a Military Department] acting through the ... Board for the Correction of Military Records (... BCMR), may correct any military record when he considers it necessary to correct an error or remove an injustice ... If a former

> service member were to demonstrate to the ... BCMR that he suffered permanent disability as a result of a service-related injury, the ... BCMR could recommend that his records be amended to reflect retroactive, permanent disability retirement. Such an amendment would create a right to both back pay and continuing annuity with benefits.
>
> Second, the Veterans Benefits Act provides a similar system of medical care, income and death benefits for the veteran and his family.
>
> *Medical Malpractice Claims by Armed Forces Personnel: Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 98th Cong., 1st Sess. 40-41 (1983) (hereinafter *"1983 House Hearings" - Committee on the Judiciary*) (Statement of B. Wayne Vance, Deputy Assistant Attorney General, Civil Division, Department of Justice).

In a 1974 military law review article, Lieutenant Robert H. Wellen, JAGC, USNR, also attested to the similarities of the two systems:

> The amount of disability benefits provided by the military departments depends directly upon the member's base pay at the time of his separation or retirement. The Veterans Administration governs a parallel system of disability benefits, under which the payments are fixed sums based on a degree of disability. Base pay is irrelevant. A service member may not receive both Armed Forces retirement pay and VA compensation, but he may elect the benefit more favorable to him. Disability retirement pay from the Armed Forces and VA compensation, then, are in a sense components of a single program. The service member receives compensation for his disability pay based on pay, but the VA provides minimum compensation for those whose base pay is on the lower end of the pay spectrum. The total system provides income protection for those with higher incomes, and a minimum-level stipend for those with low incomes.
>
> R.H. Wellen, *Armed Forces Disability Benefits -- A Lawyer's View*, 17 JAG Journal 1, 13-14 (Spring 1974) (footnotes omitted).

9/ *See Reith v. United States*, 462 F. 2d 530, 536, (1972); *Cooper v. United States*, 178 Ct. Cl. 277, 316 (1967).

10/ *Id.*

11/ Wellen, *id*. at 14 (footnote omitted).

12/ *Id*. (footnote omitted).

13/ *See Istivan v. United States*, 689 F. 2d 1034, 1037 (1982); *Murson v. United States*, 401 F. 2d 184, 187, 192 (1968); *Hutter v. United States*, 345 F. 2d 828 (1965).

14/ *United States v. Brandon*, 584 F. Supp. 803, 807 (W.D.N.C. 1984), *rev'd on other grounds*, 781 F. 2d 1051 (4th Circ. (1986).

15/ Commission on Revision of the Federal Appellate System

("The Hriesha Commission").

16/ *Judicial Review of Veterans' Claims: Hearings Before the Subcommittee on Oversights and Investigations of the House Committee on Veterans' Affairs*, 98th Cong., 1st Sess. 293 (1983) *House Hearings - Committee on Veterans' Affairs*.

17/ Source: American Bar Association.

18/ *Id.*

19/ *Id.*

20/ *Id.*

APPENDIX A

POSITION DESCRIPTION FOR ATTORNEY ADVISER
(GS-11) FOR THE VETERANS ADMINISTRATION.
BOARD OF VETERANS APPEALS,
BOARD SECTION, MARCH 2, 1982

I. PRINCIPAL DUTIES AND RESPONSIBILITIES

A. Reviews and evaluates the evidence in claims folders and prepares tentative appellate decisions in written form for consideration of the Board Section. In connection therewith, applies the laws administered by the VA to the facts in the individual cases. Cases are assgned on a selective basis to progressively gain experience in the various kinds of appellate issues.

B. Conducts research on occasion on questions encountered in case review or as requested by the Section. Drafts briefs outlining findings and recommendations as to appropriate action.

C. As assigned, classifies appellate decisions for inclusion in BVA Index I-01-1 and prepares summaries of decisions designated as "select."

II. SUPERVISORY CONTROLS OVER THE POSITION

Serves under the close supervision of the Chief Member, who is responsible for training and control of quality of tentative decisions. The incumbent may obtain the advice of Medical Advisers on medical problems and Senior Attorneys, where indicated, on legal problems arising in the preparation of tentative decisions. In general, however, he/she is expected to utilize initiative and judgment in evaluating the evidence and making findings of fact and conclusions of law in tentative decisions.

III. OTHER SIGNIFICANT FACTS

Must be a member of the bar, in good standing.

POSITION DESCRIPTION FOR ATTORNEY ADVISER (GS-13) FOR THE VETERANS ADMINISTRATION, BOARD OF VETERANS APPEALS, BOARD SECTION, MARCH 11, 1982

I. PRINCIPAL DUTIES AND RESPONSIBILITIES

A. Reviews and evaluates the evidence in claims folders. Applies the laws administered by the Veterans Administration to the facts in the individual case; then, prepares appellate decisions in written form for consideration of a Board Section. Very difficult cases, involving quesitons of law and mixed questions of law and fact are selected for assignment to incumbent. Examples: Cases in which there are multiple questions at issue; new or novel questions for which there are no precedents; claims for entitlement to several benefits; claims to entitlement under a number of different provisions of law; cases involving highly conflicting evidentiary data which must be reconciled; contesting claims from several claimants for the same benefit; and cases vigorously argued by representatives.

B. Conducts research on original and novel questions encountered in case review or as requested by the Section. Drafts briefs outlining findings and recommendations as to appropriate action.

C. Gives advisory opinions orally or in writing on very difficult, complex and controversial problems encountered in appellate review.

D. When so requested by the Chief Member, attends hearings on appeals conducted before the Board in particularly involved cases, for the purpose of assisting the Section members in examining witnesses so as to assure that all relevent evidence is elicited.

E. As assigned, prepared correspondence on the more controversial appellate decisions and problems for the Administrator's and the Chairman's signatures.

F. As assigned, classifies appellate decisions for inclusion in BVA Index I-01-1 and prepares summaries of decisions designated as "select."

II. SUPERVISORY CONTROLS OVER THE POSITION

Serves under the general direction of the Chief Member. In general, is responsible for and is relied upon to prepare decisions in final form for the Board Section's review and consideration, and receives no technical supervision. Utilizes own initiative and judgment in evaluating the evidence, making findings of fact and conclusions of law. May confer with and seek advice on complicated medical or legal problems from medical advisers or Senior Attorneys.

III. OTHER SIGNIFICANT FACTS
Must be a member of the bar, in good standing.

POSITION DESCRIPTION FOR SENIOR ATTORNEY ADVISER (GS-14) FOR THE VETERANS ADMINISTRATION, BOARD OF VETERANS APPEALS, BOARD SECTION, JUNE 10, 1983

I. PRINCIPAL DUTIES AND RESPONSIBILITIES

A. Prepares decisions on extremely complex and controversial appeals involving formal personal hearings held before members of the Board in Central Office and before travel Sections of the Board in the field.

B. Attends formal personal hearings with the members.

C. Conducts pre-hearing meetings and discussions with Members of Congress, attorneys, appellants and service organization representatives to assure due process of law and to expedite the hearing process.

D. Prepares decisions requiring a high order of original and creative endeavor based on extensive research of the most complex legal and medical problems submitted to the Board for final resolution. Obtains and evaluates expert opinions from the Chief Medical Director and independent medical experts associated with leading medical schools.

E. By direction of the Deputy Vice Chairman, formulates legal guidelines for use by other attorney-advisers to achieve uniformity throughout all Sections of the Appellate Group in the disposition of issues on appeal. Participates with medical advisers in the development of medico-legal guidelines.

F. Prepares decisions on cases before the Board through petition for reconsideration, where briefs or hearings to show error in a prior appellate decision have been presented and where the participating Board membership has been increased to six or more for the Administrator's and the Chairman's signatures.

G. Serves as Acting Board Member in the event of vacancy or in the absence of regular members, as designated by the Chairman or Vice Chairman of the Board.

H. Performs special professional assignments from the Chairman, Vice Chairman, Deputy Vice Chairman or Chief Member, to assist in the continued improvement of appellate services.

II. SUPERVISORY CONTROLS OVER THE POSITION

Serves under the direction of the Chief Member of the Board Section., who assigns the duties enumerated above and exercises general administrative supervision.

III. OTHER SIGNIFICANT FACTS

A. Must have broad legal experience in the field of veterans' benefits, preferably with at least 2 years as an attorney-adviser for the appellate agency in the GS-13 level. Must have demonstrated exceptional ability to: timely prepare high quality decisions on extremely complex and controversial appeals involving unusual issues; authoritatively discuss legal and medical principles and evidentiary requirements with outside attorneys, physicians and appellants.

B. Must be a member of the bar, in good standing.

APPENDIX B

U.S. House of Representatives
COMMITTEE ON VETERANS' AFFAIRS
Washington, DC 20515

July 11, 1986

Mr. Howard J. DeNike
333 Franklin Street
San Francisco, California 94102

Dear Mr. DeNike:

Thank you for writing to express your views on the testimony presented by Mr. Rosenberg to the Committee on June 24. The views of Mr. Rosenberg were of course his own views and were presented as such.

I think that it is to be expected that attorneys will differ in their views of the treatment that they receive before various administrative tribunals. I also believe that Mr. Rosenberg's testimony raised some very serious points that cannot be dismissed simply because the experience of another attorney is not the same. His testimony does point out the danger of comparing systems that have been adopted to meet different ends, and reports his own favorable experience with cases which he takes on a pro bono basis before the Board of Veterans' Appeals. I found his testimony to be helpful in meeting the Committee's objective of fully exploring what might occur if expanded judicial review of veterans claims were permitted.

Sincerely,

G. V. Montgomery
G. V. (SONNY) MONTGOMERY
Chairman

320 Todd Branch Drive
Columbia, S.C. 29223

May 28, 1986

Honorable G.V. Montgomery
Chairman
House Committee on
Veterans Affairs
334 Cannon Office Bldg.
Washington, DC 20515

Dear Chairman Montgomery:

I am writing you to provide information that I think will be useful to your committee in its deliberations on H.R. 585.

Until last year, I served as Executive Secretary of the Air Force Board for Correction of Military Records. I served five years in that capacity. Before that I served eight years as a Senior Examiner to the AFBCMR. I also served in the U.S. Army from 1965-1968 and from 1970 to 1973 as Night Force Supervisor preparing daily news summaries for the President of the United States.

As you know, the Boards for Correction of Military Records (BCMR) consider many military disability retirement cases which are similar in many respects to Veterans Administration service-connected disability compensation claims. The BCMRs also review other types of cases that contain issues similar to VA claims, e.g., line of duty investigations, propriety of character of discharge, etc. Counsel before the BCMRs are by and large service officers of the veterans service organizations and the Red Cross. Veterans also hire attorneys to appear before the BCMRs in the more complex cases. The BCMRs have been subject to judicial review on questions of law and narrow review of questions of fact for at least 40 years.

The BCMRs operate in such a manner as to give the benefit of the doubt to the veteran in all cases. Reconsideration of a previous BCMR denial is generously afforded. Despite the presence of lawyers in complex cases and the availability of court review, the system is non-adversarial.

A relatively small percentage of BCMR decisions are challenged in federal court, and the effect of court review on the operation of the BCMR is on balance positive. Over the years I have had conversations with colleagues from the other BCMRs and my sense is that they share my views. It is also my impression that most service officers of veterans organizations also favor judicial review.

If I can supply further information, do not hesitate to contact me.

Sincerely,

/s/
William T. Randell

cc: Honorable Don Edwards
U.S. House of Representatives
Washington DC 20515

WTR/jme

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MARY BALUSS
DIAL DIRECT (202) 872-4790

July 18, 1986

Chairman G.V. Montgomery
House Committee on Veterans Affairs
U.S. House of Representatives
Washington, D.C. 20515

Re: *H.R. 585*

Dear Mr. Chairman:

I have recently learned of testimony presented to you by Mr. Keith Rosenberg on the issues of (1) removal of the $10 attorney fee limitation for representation in Veterans Administration (VA) claim and (2) repeal of the restrictions on judicial review of VA determinations. Several aspects of Mr. Rosenberg's testimony concern me.

Mr. Rosenberg told the Committee that it can "rest assured that if judicial review is allowed in Veteran's Administration cases, the technical defenses that have emerged in military pay cases will more than likely be raised in the judicial review of Veterans Administration decisions." Putting aside the question of how the imposition of technical defenses that would affect *some* appeals would be worse for veterans than the complete absence of an appeal right, I must question the factual basis for Mr. Rosenberg's statement. It rests in part on *Matter of VanderMolen*, Decision of Comptroller General B-199060 (1980). Mr. Rosenberg cites *Vandermolen* as authority for the proposition that the "technical defense" of res judicata will creep into veterans appeals. However, Mr. Rosenberg omitted an important fact regarding the VanderMolen appeal. As the attorney who represented Mr. VanderMolen in his suit for reinstatement, I believe the record before you should reflect that Mr. VanderMolen made an express and knowing waiver of all claims in excess of $10,000 in order to invoke the jurisdiction of the United States District Court under 28 U.S.C. §1346(a)(2)(1982). The court recognized his right to make the waiver. When Mr. VanderMolen later sought damages in excess of $10,000, the Comptroller General relied on the waiver rather than a concept of res judicata more generally applicable to BCMR appeals.

There is another, more subjective, aspect of Mr. Rosenberg's testimony, with which I disagree. Mr. Rosenberg asserts that the Boards for Correction of Military Records (BCMR) have become more formal and technicality oriented with the availability of judicial review. Of course, Boards differ as individual experiences differ. However, in my dealings with the AFBCMR, including an appeal completed only last month, I have found a general willingness to look at substance rather than to take advantage of the "technical defense." One can take issue with the outcome of particular appeals without losing an appreciation for the extent to which that Board at least has maintained an informal and accessible atmosphere. I have found the BCMR far easier to deal with than the Veterans Administration.

I hope the Committee will find favorably on the proposed legislation. Based on my observations and experience, veterans are not well-served by the present limitations.

Respectfully submitted,

Mary Baluss

Mary E. Baluss

MEB:pas

APPENDIX C

Cambridge Survey Research

Fifth Floor 3299 K Street, N.W., Washington, D.C. 20007 Telephone (202) 337-6822

MEMORANDUM

TO: VIETNAM VETERANS OF AMERICA

FROM: CAMBRIDGE SURVEY RESEARCH

RE: NATIONAL SURVEY OF VETERANS

DATE: APRIL 28, 1988

I. EXECUTIVE SUMMARY

There has been some dispute over whether veterans favor or oppose a change in law that would allow them to go beyond the VA's administrative court system to appeal VA decisions. Some veteran's groups have claimed that veterans support the current system because, they argue, this system has served veterans well. Others claim that veterans would prefer to change it since it deprives them of a basic American right--access to the courts.

We attempted to answer this question by asking a nationally representative sample of veterans their opinion on the issue. In this survey we defined "judicial review" for veterans in layman's terms and provided brief arguments for and against the current system. Veterans were then asked to identify whether they favored or opposed the current system.

The following major findings emerged from this study:

1. When given a choice, veterans prefer to change the current system by a margin of 3 to 1. A dominant majority of 72% would prefer access to the courts while 22% favor maintaining the current system and 6% are uncertain which option they favor.

2. Support for this change is strong across all major demographic and attitudinal groups. There were no significant subgroups whose support level was less than 60%.

3. There is strong support for this change among veterans of all age groups. While support is consistent across the spectrum of groups, the intensity of this support varies moderately according to age. Younger veterans (those 50 and under) were the most intensely supportive of change (89% support). The least strongly supportive veterans were those who were retired (66% support) and those over 50 (65% support). Even among the these last groups, however, it should be emphasized that they still support judicial review by a 2 to 1 margin.

The following is the question text and results:

With one exception, Americans have the right to take a government agency to court if they disagree with a decision made by that agency. This right, called the right of "judicial review," is currently denied to veterans in disputes with the Veterans Administration, known as the VA. When veterans disagree with decision of the VA, the VA itself reviews that decision and makes a final judgement which cannot be appealed in court. Some people feel that this denies veterans fair treatment. Others say that the current system has treated veterans fairly. Which of the following statements comes closer to your point of view?

	US Veterans
The current system used by the VA to handle veteran's claims is fair. There is no need to change the system by subjecting the VA to judicial review.	22%
Veterans should have the right to appeal administrative decisions to the courts. The VA should be subject to the same judicial oversight as every other government agency.	72%
Don't Know	6%

III. SUBGROUP ANALYSIS

The following chart profiles the opinion by significant demographic catagories. The percentage size of individual groups as part of the sample is provided in parentheses with each group.

	VA SYSTEM		
	IS FAIR	SHOULD CHANGE	DON'T KNOW
	22%	72%	6%
Sex			
Male (96)	23%	71%	6%
Female (4)	15	85	0
Education			
High School (55)	22	70	8
College (44)	23	74	3
Occupation			
White Collar (31)	18	79	3
Blue Collar (22)	21	71	8
Retired (38)	27	66	7
Other (8)	22	72	6
War Generation			
<50 (30)	9	89	2
50+ (67)	27	65	7
Religion			
Protestant (58)	22	73	5
Catholic (25)	20	70	10
Other (17)	25	71	4
Race			
White (85)	24	70	6
Non-White (15)	12	84	4
Primary Information Source			
Television (52)	19	75	6
Newspapers (30)	22	73	5
Other (18)	32	60	9
Ideology			
Liberal (27)	25	70	4
Moderate/DK (21)	19	73	8
Conservative (52)	22	72	6
Region			
West/Plains (20)	21	75	5
Midwest (25)	19	74	6
South (32)	26	69	5
East (24)	21	70	9

While there is no statistically significant opponent groups given the overall strength of support, there is moderate variation between groups along a spectrum of strength. The following chart rank orders the subgroups according to their level of support.

Strongest Supporters (79% or greater support)	
Under 50 years old (30)	89%
Female (4)	85
Non-White (15)	84
White-Collar (31)	79

Moderately Strong Supporters (69-75% support)	
Television-Primary Source (52)	75%
West/Plains (20)	75
College (44)	74
Midwest (25)	74
Protestant (58)	73
Newspapers-Primary Source (30)	73
Moderate/DK (21)	73
Conservative (52)	72
Other Occupations (8)	72
Blue Collar (22)	71
Male (96)	71
Other Religions (17)	71
High School (55)	70
Catholic (25)	70
White (85)	70
Liberal (27)	70
East (24)	70
South (32)	69

Least Strong Supporters (less than 69% support)	
Retired (38)	66%
Over 50 years old (67)	65

Weakest and Strongest Supporters

An analysis of subgroups reveals that support is most intense among veterans under the age of 50 where the margin of support is nearly 9 to 1 (89% support). Support is also intense among women (85%), non-white veterans (84%) and white-collar workers (79%).

The far majority of the subgroups fall within the middle of the scale and can be classified as strong supporters. These groups include everyone from college educated veterans (74%) to high school graduates (70% support); conservatives (72%) to liberals (70%); midwesterners (74%) to easterners (70%).

On the bottom of this scale, support is generally strong but least intense among the older veterans. Retired veterans support this change (66%) as do those 50 or older (65%).

III. METHODOLOGY

This report covers the findings of telephone interviews with a nationally representative sample of 326 veterans conducted from March 22 through March 29, 1988. The sample was adjusted slightly with regard to race. Interviews for this study were conducted by trained, professional interviewers. Telephone numbers were randomly generated by computer to represent both listed and unlisted telephone households. The sampling error is ± 4.8 for the results of this study's central question.

APPENDIX D

the analysis group inc

Stanley B. Greenberg, PRESIDENT

Date: August 12, 1988

To: Mary Stout, President
Vietnam Veterans of America

From: Stanley B. Greenberg, President
The Analysis Group, Inc.

Re: Survey of Republican Delegates

Republican delegates strongly support veterans and veterans programs. In other areas these generally conservative delegates are resistant to increased government regulation and spending. However, by an overwhelming 77 to 15 percent they support extending disability compensation to Vietnam veterans suffering from diseases associated with exposure to Agent Orange. Over two-thirds support, in principle, the concept that veterans should be allowed to seek court review in benefit disputes with the Veterans Administration. Just 17 percent are opposed to allowing such reviews.

At the same time, Republican delegates want to assure that the Veterans Administration budget serves veterans' needs: 84 percent favor a comprehensive review of VA priorities in light of the fact that just 15 percent of its hospital beds are occupied by veterans with service connected injuries or disabilities.

MAIN OFFICE 588 East Street, New Haven, Connecticut 06511 203 773-3480
DC OFFICE 507 Capitol Court, N.E. Suite 100, Washington, DC 20002 202 547-5200

Support for veterans extends across ideological, regional and demographic groups. However, delegates under age 45 tend to give veterans stronger and more intense support than older delegates.

It is important to keep in mind that these Republican delegates on most other issues hold to mainstream Republican and conservative positions. Over three-quarters of them (78 percent) are self-identified conservatives, including 37 percent who describe themselves as fairly or extremely conservative. Over three-quarters (again, 78 percent) believe the government should hold the line on taxes, rather than maintain and improve government services.

Providing a Court Review in Benefits Disputes

Republican delegates favor by three-to-one legislation that would allow veterans to seek an outside court review in disputes with the Veterans Administration.

Support extends across ideological and regional boundaries. However, women (73 percent) are more likely than men (64 percent) to favor such legislation and delegates under age 45 (72 percent) are somewhat more supportive than older delegates, particularly seniors (63 percent).

The exact question wordings and results are presented below:

COURT REVIEW AND BENEFIT DISPUTES

THE VETERANS ADMINISTRATION

Question: "Passing legislation which would allow veterans to seek a court review in benefit disputes with the Veterans Administration. Do you strongly favor, favor, oppose, or strongly oppose this proposal?"

Strongly favor	8
Favor	60
Oppose	15
Strongly oppose	2
Don't know	14

Compensation for Diseases Associated with Agent Orange

Delegates are strongly supportive of proposals to provide disability compensation for diseases associated with Agent Orange, despite a general predisposition among the delegates against government spending. Not only do 77 percent of these delegates wish to extend disability benefits, 16 percent strongly favor such a policy.

Support for compensating Vietnam veterans for Agent Orange associated diseases spans all subgroups of Republican delegates though the issue carries special intensity for younger delegates:

80 percent of delegates under age 45 and 78 percent of delegates aged 46-55 support extending disability compensation to Agent Orange associated diseases.

Support is constrained slightly by ideology: 89 percent of delegates who are not conservatives support compensation for Agent Orange associated diseases; 73 percent of extremely conservative and 67 percent of fairly conservative delegates share that view.

The exact question wording and results are presented below:

DISABILITY COMPENSATION FOR VIETNAM VETERANS SUFFERING FROM DISEASES ASSOCIATED WITH AGENT ORANGE

Question: "Passing legislation that would provide disability compensation for Vietnam veterans suffering from cancers and other diseases associated with exposure to Agent Orange. Do you strongly favor, favor, oppose, or strongly oppose this proposal?"

Strongly favor	16
Favor	61
Oppose	13
Strongly oppose	2
Don't know	7

A Comprehensive Review of Veterans Administration Priorities

Republican delegates almost unanimously believe that the Veterans Administration should be subject to an outside review of its priorities, once they are told how few VA Hospital beds are filled by veterans with service related injuries or disabilities.

There is little variation by ideology or demographics on this question, although "extremely conservative" delegates, who seem to reject almost any government action posed, are somewhat less supportive than others (77 percent).

The exact question wording and results are presented below:

A COMPREHENSIVE OUTSIDE REVIEW OF THE VETERANS ADMINISTRATION

Question: "The Veterans Administration budget includes 28 billion dollars for services and benefits and yet, only 15 percent of its hospital beds are occupied by veterans being treated for service connected injuries or disabilities. Would you favor or oppose an outside, comprehensive review of the Veterans Administration to re-examine its priorities?"

Favor	84
Oppose	10
Don't Know	6

SURVEY METHODOLOGY

The Analysis Group, Inc. conducted telephone interviews with 399 delegates to the 1988 Republican National Convention. Delegates were selected randomly and interviewed on the phone both at home and at work. The calling was conducted in two phases, June 22 through June 28, 1988 and July 5 through July 6, 1988, so that delegates could be interviewed soon after selection and in order to maximize the number of states represented in the sample.

Telephone numbers for this survey were selected from a computerized file of delegates to the 1988 Republican National Convention. The file included delegate names and telephone numbers which were acquired directly from each state party and confirmed with lists from the Republican National Committee. Thirteen states did not include phone numbers with the list of delegate names, and in those states, manual and operator assisted look up was used to complete the file. The sample was stratified geographically by state and territory, and each state and territory was represented in the sample proportion to its contribution to the total delegate allocation as determined by Rule 31 of the Rules of the Republican Party. The following states were excluded from the sample because delegate selection had not taken place or state listings were not available: Connecticut, Guam, Iowa, Montana, New Mexico, Oregon, Virgin Islands, and Washington.

Political scientist, Professor Kent Jennings of the University of Michigan Institute for Social Research, reviewed the questionnaire to identify problems that might bias the survey findings. Professor Jennings is a noted specialist on delegate attitudes and has published extensively on the subject, including his book, Parties in Transition, A Longitudinal Study of Party Elites and Party Supporters.

In interpreting survey results, all sample surveys are subject to possible sampling error; that is, the results of a survey may differ from those which would be obtained if the entire population were interviewed. The size of the sampling error depends upon both the total number of respondents in the survey and the percentage distribution of responses to a particular question. The sample of 399 permits generalization to all Republican delegates, with an error of plus or minus 4 percent.

If for example, 52 percent of the 399 sampled respondents strongly favor passing a constitutional amendent to balance the budget, this percentage would have a sampling error of plus or minus 4 points. With repeated sampling, it is very likely that the percentage for the entire population would fall between 48 percent and 56 percent. The sampling error for smaller subgroups in the sample is larger according to the size of the subgroup being examined.

APPENDIX E

Questionnaire Results

What You Told Me On These Key Issues:

1. What do you suggest as the fairest way to balance the budget?

○ Cuts in spending	67%
○ Increases in taxes	3%
○ Combination of both	30%

2. Would you favor U.S. trade barriers to fight unfair foreign trade practices, even if it meant higher prices here at home?

○ Yes	61%
○ No	39%

3. Federal budget writers have proposed cutting state and local drug-enforcement grants from $225 million to zero in 1988. Do you agree with my efforts to restore funding?

○ Yes	76%
○ No	24%

4. Would you favor higher monthly Medicare premiums to obtain nursing home care under catastrophic health insurance proposals?

○ Yes	75%
○ No	25%

5. Should the Veterans Administration be subject to judicial oversight, as are other federal agencies?

○ Yes	77%
○ No	23%

6. Do you support the Interior Department proposal that would allow oil companies to drill within 30 miles of Florida's coast?

○ Yes	39%
○ No	61%

7. With regard to nuclear energy, which do you favor?

○ Build more facilities	35%
○ Keep at current levels	52%
○ Close existing facilities	13%

8. Do you support development of the Strategic Defense Initiative ("Star Wars") weapons system?

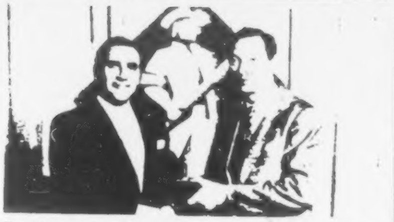
○ Yes, unconditionally	29%
○ Defensive purposes only	38%
○ Under treaty controls	14%
○ No, unconditionally	19%

9. What is the most significant problem facing our economy?

○ Budget deficit	64%
○ Trade deficit	21%
○ Unemployment	9%
○ Tax code	6%

10. For each of the following services, please indicate whether spending should be increased, decreased or left the same?

	Increase/Decrease/Same
○ Defense	17%/38%/45%
○ Social Security	38%/6%/56%
○ Veterans Benefits	33%/9%/58%
○ Environmental Protection	49%/11%/40%
○ Crime Control	70%/3%/27%
○ Transportation	31%/17%/52%
○ Public Assistance for Needy	39%/19%/42%
○ Medicare	52%/6%/42%



For his support of American small business, Congressman Dan Mica recently received the 1986 "Guardian of Small Business" award from John Sloan, president of the National Federation of Independent Businesses.

Join the Drug War

Every Floridian can join the war against drug abuse with the help of the U.S. Customs Service.

A *Drug Smuggling Awareness Kit* can be obtained free by writing the Customs Service Office of Public Affairs, 1301 Constitution Ave. N.W., Room 3422, Washington, D.C. 20229.

Included in the kit is information on obtaining a Customs Service speaker; pamphlets on illegal drugs and drug abuse problems; information on reporting drug smuggling, and the Department of Education booklet, "Schools Without Drugs."

Mica Named to Trade Conference

Rep. Dan Mica has been named to the upcoming House-Senate conference that will negotiate a final version of the omnibus trade bill.

Mica, a senior member of the House trade subcommittee, said his appointment gives Florida's international traders a "unique opportunity" to help shape the final legislation.

"We have a duty to insist that other countries treat American-made products in the same manner we treat their products," Mica said. "That's common sense."

Are You Interested?

If you would like information on any of the following subjects, please check the appropriate box and return to me.

- ☐ Social Security/Medicare
- ☐ Veterans Affairs
- ☐ Crime/drug abuse
- ☐ Health Care
- ☐ Other

Comments: ______________________________

____

____

____

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J. Thomas Burch, Jr.
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BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON VETERANS AFFAIRS

September 8, 1988

TESTIMONY ON JUDICIAL REVIEW

Mr. Chairman, we thank you for this opportunity to testify before the Committee. The National Vietnam Veteran Coalition is a federation of approximately 45 Vietnam veteran and veterans issues organizations. It was first organized in 1983 in an effort to unify the fractionalized Vietnam veterans organizations around common concerns. One of the eight issues around which unity became feasible was support for judicial review of VA benefits decisions. We are therefore proud to testify today in support of H.R. 639.

Our system of government has placed a great value on both legal due process and upon the right to counsel. Under the circumstances, we find it difficult to understand why veterans should be denied the right to appeal an adverse arbitrary and capricious benefits decision into Federal Court, in contrast to prevailing practice in virtually every other form of administrative adjudication. Likewise, with the ten-dollar fee limit on attorney representation constituting an effective bar to nearly all attorney representation of veterans, the right to representation by counsel is not present. If a person desires to be represented by counsel in this country, he should have that right.

The adjudicators at the Veterans Administration are human beings. As such, they are subject to the foibles and weaknesses of any other human being. We have no reason to believe that the adjudicators at the Board of Veterans Appeals or its inferior bodies are any better or any worse, more rational or less rational, than the decision makers in any other administrative body. We would defy anyone to produce an example of an administrative agency in this country which boasts an unblemished record, which has not been overruled by a Court. Therefore, any aggrieved veteran should have the

This prediction is grounded in the realities of legal economics. And here I speak as a practicing lawyer. Two key considerations govern here: first, the $500 fee permitted under H.R. 639 is not likely to be all that attractive to a lawyer -- if we assume a minimum billing rate of $75 an hour, any lawyer who devotes even seven hours to a case has lost a bit. Therefore, the maximum 25% contingency fee provided for in the bill will be the attraction to the attorney; what this means, in turn, is that an attorney will only be willing to take cases which offer the prospect of victory. The allowance rate at BVA is very low--less than 15%; every service officer with whom we have spoken feels that the overwhelming majority of claims adjudicated at the BVA level lack merit.

Further, for economic reasons, the service officer will remain a viable alternative to the attorney. We find it difficult to believe that the average claimant, faced with a choice between retention of an attorney, who charges a significant, fee and a service officer, who provides a free service, will opt for the attorney representation. We may also safely assume that, once attorney representation becomes a reality, both the Veterans Administration and the veterans service organizations will increase their efforts to promote awareness of the service officer alternative.

The second major argument against judicial review -- overcrowding of the federal courts -- founders on these same economic realities. Only winning cases will be selected for appeal. Further, if indeed there will be enough cases to constitute overcrowding, we submit that this would be a serious indictment of the Veterans Administration for having handled so many cases improperly in the first place. And if the situation were indeed so bleak, we must ask, why should the innocent disabled veteran be made to suffer?

Another reason for believing that overcrowding will not take place is the comparable experience of adjudications by the armed services administrative boards on disability retirement, correction of military records and discharge upgrading, all of which are presently subject to judicial review. The Department of Defense Office of the Actuary, as of September 30, 1986, listed 138,773 living retirees receiving disability pensions. This is a rather sizeable program. Yet, when we requested statistics on lawsuits filed by disaffected claimants, we were advised that there were no statistics. We infer from this absence that legal challenges to DOD adjudications are rare, despite the fact awards are more sparingly granted at DOD than at VA (254,707 retirees deemed non-disabled by DOD -- nearly 25% of all retirees -- received VA disability, as of September 30, 1986).

contrary possibility is that the case will resolve itself easily and lucratively for the attorney.

While there is much to be said for foreclosing the latter opportunity -- and we understand informally that the Social Security Administration has now taken steps to reduce the upper bracket of attorney compensation -- the foregoing flawed analysis by the Inspector General hardly justifies the picture now being painted, by some opponents of judicial review, of large numbers of attorneys deliberately setting out to overcharge their clients. Indeed, if one both allows for market-based attorneys fees and concedes the "equivalent rate" standard, then the Inspector General's statistics show that at least 55% of the attorneys - those receiving an equivalent rate of less than $75 - were in fact undercompensated. The 20% identified as receiving $75-99 are within the zone of reasonableness. It cannot be determined from the report whether another 21% of the supposedly excessive fees are, in fact, unreasonable.

We are thus left with a showing that, in reality, perhaps only 4% of the attorneys participating in the Social Security administrative process (at $200 or above) are overcompensated, that the majority (55%) are in fact undercompensated and that the average attorney (at $71 an hour) is undercompensated.[2]

Another argument which has been made is that, given the ability of a court to scrutinize an adjudication, VA will resort to defensive record-building, that its pro-veteran stance will be modified in various ways. Apparently, however, this has already happened. In his testimony before the sub-committee on October 6, 1987, VA general counsel Donald L. Ivers noted that the combination of "increasing involvement by the federal courts in was subject to a contingency fee agreement. To the extent that the subsection may permit such an outcome, it should be redrafted. An attorney who accepts a case on a contingent fee arrangement assumes the risk of no payment at all. There is no basis for an alternative fee, as this section would seem to provide.

---

[2] Since Social Security cases under judicial review are subject to the Equal Access to Justice Act (EAJA), the Inspector General has presumably appropriated its $75 hourly fee and equivalent rate standards from this law. One could just as easily appropriate legal fee standards from other statutory schemes, which provide for larger fees. But even the EAJA analysis is incomplete. The law provides, at 28 U.S.C. Section 2412(d)(2)(A)(ii) that "an increase in the cost of living" of "a special factor" can justify a fee of higher than $75 an hour. The cost of living provision has been used to justify not only increases due to inflation, Trichilo v. Secretary of Health and Human Services, 823 F.2d 702 (2d Cir. 1987), but also prevailing higher costs in particular localities, see, e.g., Preston v. Heckler, 596 F. Supp. 1158 (D. Alaska 1984)(cost of living in Fairbanks, Ak.).

For the reasons stated, we believe judicial review is necessary. To reach this conclusion, we need not reach the more serious allegations of mismanagement and misconduct within the Veterans Administration, as, for example, the recently published critique by the House Committee on Government Operations. If these allegations more closely represent the total reality of the VA system than do the perceptions of the major service organizations, then the need for judicial review becomes still more compelling.

Thank you.

018WTB1.D3/nmf

VETERANS DUE PROCESS/ Sidney Cooper/ Suite 29 A
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Date: August 30, 1988

Written Statement of :

Veterans Due Process, Inc

Prepared by :

SIDNEY COOPER
National Legislative Director

Submitted to:

UNITED STATES HOUSE
COMMITTEE ON
VETERANS' AFFAIRS
concerning
H.R. 639, 5039, S. 11, S. 2292

General Subject : Judicial Review Legislation.

For Hearing of September 8, 1988

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Introductory Remarks

Veterans Due Process, recognized by the American Bar Association, the National Law Journal, Stars and Stripes, among others as the leading " independent " veterans civil rights organization, is pleased to be accorded this opportunity to testify in favor of a veteran's right to " de novo " judicial review, to an attorney and to be restored to first class citizenship.

VDP, sadly, has no alternative but to express its strong disapproval of Congress, and particularly, this Committee for its failure to report out judicial review legislation after unanimous passage by the Senate four times ; and now, is considering similar legislation for a fifth time after the Senate's overwhelming approval.

There was, and is no excuse, for this Committee's failure to act on remedial legislation given the evidence available; some of which may be found in the remaining portions of this testimony.

Delaying, dilatory and stonewalling tactics by this Committee (re: judicial review) have contributed to much national criticism, derision and scorn by civil libertarians everywhere. Its past actions are indefensible.

Time and tide, however, waits for no man or Committee, as the Courts are becoming increasingly more involved, so clearly evidenced by Marozsan v the United States and the recent suit in New York; both sponsored by VDP. Consequently, this Committee may soon become irrelevant to the entire process unless it acts convincingly and with dispatch to restore compassion, fairness and justice to the VA's " plague infested " system of injustice.

Legal News Update Re: VDP Supported Cases to Restore Veterans to 1st Class Citizenship.

Initially, this Committee should be advised of the landmark Marozsan case which was favorably decided (July 25,1988) in the 7th Circuit Court of Appeals (en banc) 7 1/2 to 3 1/2. In VDP's judgment this decision represents the most significant advance in our long quest to achieve veterans' rights to an attorney and a day in court; and will be quoted as a beacon of liberty long after we're all buried and gone.

Specifically, veterans won the right to litigate the constitutionality of the numerous unfair VA practices and procedures to include the quota system and other clandestine practices.

The breadth of the Marozsan decision is best understood by the type of language used by the 7th Circuit Court of Appeals Judges, when rendering their opinions, from brief excerpts, as follows:

1) " Marozsan's allegation that the VA Administrator utilizes an arbitrary " quota system " requires constitutional analysis particularly within the competence of an independent judiciary."

2) " Courts.......must be equally reluctant to license free wheeling agencies to mete out their own brand of justice. "

3) " It is axiomatic that Congress may not act unconstitutionally, nor may it delegate authority to executive agencies to do so. "

4) " If the Court were to accept the government's position that 211(a) bars a review of Marozsan's claim ...... [that] would subvert the judiciary's function of providing a check against arbitrariness ... by Congress, the Executive, and their Administrative agents."

5) " To deny jurisdiction to claimants like Marozsan, would be to find that veterans simply have no forum in which to pursue a claim that the VA violated the Constitution. "

6) " A statute which precludes review_of such obviously unconstitutional decisions must be just as unconstitutional as the the underlying action of the [VA] Administrator.

note : Referring to the VA's assertion that the Courts lacked authority to review the constitutionality of VA decisions which denied claims solely on account of race, color and gender.

7) " An alleged arbitrary quota system that obviates the Administrator's need to consider the evidence is no mere detail but a serious question of constitutional dimension. "

8) " Congress intends the executive to obey its statutory commands and, accordingly, that it grant relief when an agency violates such a command. Congress must expect executive agencies to be no less faithful to the Constitution. "

VDP believes that never in our history has there been a more flagrant and callous disregard of citizens rights, as those manifested, in the VA's adjudication of veterans claims !

Close on the heels of Marozsan, comes another VDP sponsored suit, filed recently in a Manhattan, New York District Court which repairs all of the technical infirmities in Marozsan, bringing the Court face to face with the acid question - namely, the constitutionality of 211(a), the " no review " clause ; the attorney preclusion and cruel and unusual punishment clauses [3404 c (2), 3405 (2)]; the blackmail and intimidation clause [3402 (2)]; while seeking injunctive relief and special master oversight over the reasonable doubt and claims development clauses, among other requests for relief.

In prior cases, questioning the constitutionality of 211 (a), the Courts, have not heretofore been shown, such massive evidence of wrong doing, as VDP is prepared to present. Evidence which has continually been ignored by Congress; and, much of it inexplicably, comes directly from this Committee.

Unless Congress acts soon, whatever legislation is later enacted, may well prove irrelevant. Band Aids will no longer suffice, nothing less than De Novo review will satisfy veterans or VDP. Nor, do we believe the courts will accept anything less, once the evidence is sifted, analyzed and understood.

VA 's Assertions in Court Differ Markedly From Testimony Before Congress.

- **while** members of Congress call veterans benefits " entitlements" , VA bureaucrats in Court call them gifts.

- **while** Congress mandates that veterans be treated fairly, the VA in court asserts that even if their bureaucrats deny claims solely on account of race, color or gender, that the courts have no jurisdiction and that it's none of their business.

- **while** Congress has taken an oath to uphold the Constitution, the VA (its offspring) in Court asserts that they're not subject to the Courts, and that 211 (a) places them above the law and that no court has jurisdiction over them no matter what constitutional offense has been committed.

- **while** Congress has mandated uniformity in decsionmaking, VA bureaucrats refuse to codify their decisions so that uniformity can be achieved. Consequently, identical claims may be accorded different treatment. In court, however, the VA asserts that uniformity of decsionmaking can not be achieved by the courts codifying decisions - despite, the VA's puzzling failure to insure uniformity by codifying their decisions.

- **while** asserting that it [VA] has special medical expertise, submitting that claims are too complicated to be adjudicated by a Federal Judge - yet, VA general practitioners are deciding claims at supersonic speed levels with one eye on the clock and the other on production bonuses - never mind the medical evidence !

VA's Favorite Ploys Utilized to Frustrate Veterans

Let's examine some of the VA's favorite tactics, calculated to intimidate and frustrate veterans into abandoning perfectly valid claims:

1) Ignore the evidence, no matter how many times it appears in the files. Recently, despite the fact that evidence crucial to a veteran's claim (unnamed, for veteran's protection) appeared 12 times on Army in -service medical records, the VA pretended it never existed. Not once but many times.

2) Assert the veteran had a prior service condition, irrespective of the fact that schools, family doctors and pre-induction physicals clearly showed no prior service injury. What evidence does the VA usually have to sustain their prior service injury contention ? None, absolutely none !!?

3) Fabricate medical theories out of whole cloth. Anything to deny a veterans claim. Never mind what the Medical experts or articles or books say. Our General Practitioners understand what's required of them or what side their bread is buttered on. Obviously, it's far preferable to deny claims than to acknowledge them.

4) Falsify, the rating data or evaluation. Use the wrong rating code, the one, which will impoverish the veteran most ; and then, downgrade the injury. After all, what do veterans know about rating codes or anything else. Moreover, the NVO's will go along with whatever we say.

On the theory that it is far better to deny claims, than acknowledge them; the VA cunningly, deceitfully and deliberately denies them, irrespective of the evidence. The VA's order of the day :

> **They Shall Not Pass Claims Muster ! Not On My Watch !**
> **We Have Quota Systems and Budgetary Responsibilities to Defend!**

Occupying offices in every single VA adjudication building, it is strange that never once have the NVO's come to this Committee and told them about the travesties of justice they've witnessed, when representing veterans ? Never once, and why ?

Simply because they are in league with the the VA, they've sold their members out on a cross of free services. While there are some good claim officer's (not many, the best ones are discharged or told to remain silent), none of them dare rock the boat for fear of losing their jobs.

v

It's strange, that this Committee never appears to have brought in some Service Officers, as witnesses, swear them in, grant them the Committee's protection, and get the truth. The " awful truth " that this Committee has studiously avoided. VA employees and Service officers' are ready to spill their guts, if only someone will ask them a question !

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Who Speaks for Veterans on the Issue of Judicial Review ?

We speak for virtually all of the twenty million veterans not currently represented by National Veterans Service Organizations (NVSO's); and for many, if not most, of their (NVSO) members whom we believe to have been disenfranchised and/or ignored on the issue of judicial review. Simply put, in the name of the overwhelming majority of veterans and their dependents, we demand our right to a day in court; to retain an attorney of our choosing; and to the restoration of our first class citizenship rights.

Congressman ask yourselves, did veterans fight wars to make the the world safe for the bureaucrats at home ? Did we risk our lives to protect everyone else's constitutional rights at the expense of our own ? Did we willingly accept the loss of our constitutional rights or was that taken from us in the middle of the night while the Press yawned; the ABA slept ; the ACLU shrugged ; the Congress procrastinated ; and our NVSO's sold us out on a cross of free services aggregating millions of dollars ? **Blackmail !** the Wall Street Journal reported. We call it betrayal.

Ask yourselves, how many veterans would support their NVSO leadership's position that compensation received for war injuries was nothing more than gifts ? How many veterans would knowingly accept the proposition that welfare recipients receive entitlements while veterans receive only gifts ? How many veterans would knowingly accept the fact that spies, traitors and criminals have more legal rights than they do ? How many veterans would knowingly favor hoodwinking youngsters into our armed services and then, if injured, deprive them of their constitutional rights ?

Under such circumstances, how could the Congress believe that the NVSO's represented their members on the critical issue of judicial review !!? Further, how could Congress believe that veterans would support issues so contrary to their best interests ? More importantly, how could Congress permit such outrages against veterans or any citizen of this country ? Veterans have been kept in ignorance of their leadership's betrayal, what excuse does Congress have ?

page-2-

Entitlements versus Gifts

If Congress has any doubt over the NVSO leadership's position on the issue of gifts, ask them whether they would support a sense of the Congress resolution designating veterans benefits, as entitlements ? If they accepted, and Congress agreed - we could all go home and judicial review would be a reality. Congress need do nothing more. The Courts would do the rest.

An enormous legal distinction exists between gifts and entitlements. Welfare (entitlements) are accorded the full due process protection of the courts while veterans (gifts) are denied similar protection. Consequently, bureaucrats tred softly on welfare recipients' " entitlements " while it's open season on veterans (gifts) which are subject to the whims and caprices of bureaucrats operating under rules, regulations and operating procedures which are demonstrably unfair; and from which, there is no appeal.

Historical Perspective (Short Form)

The right to petition the courts for redress of just grievances is a basic and fundamental right of all Americans. Yet this right is routinely denied American veterans. If the Veterans Administration (VA) says it's night despite the fact that it may be day, there is not a power on earth which can cause that Agency to change its decision, once it has been made. For example, a veteran could obtain expert witnesses, the most learned academicians and scientists, but nothing could prevail against a Board of Veterans Appeals (BVA) decision.

Why is it that veterans are denied the right to judicial review or their day in court when they feel unfairly treated by the VA administrative process ? Congress when it passed U.S.C., Title Law # 38, believed that veterans would be treated so fairly that legal remedies would not be necessary. Moreover, Congress further believed that the " unscrupulous legal profession " should be excluded from participating in veterans claims awards, limiting attorney fees to ten dollars. To insure compliance, Congress imposed jail sentences of two years at hard labor and fines for attorneys accepting fees in excess of ten dollars.

Veterans denied adequate legal representation and the right to have claims litigated on their merits in a court of law - were soon fair game for bureaucrats with competing interests, primarily their own. Budgetary considerations, empire building, promotion, monetary awards, and undisclosed interests harboring secret agendas supplanted fairness and justice at the VA.

Quota System of Dispensing Justice

Veterans stripped of their constitutional protections were consigned to the mercy of unfair VA administrative practices and procedures without legal redress. **Routinely,** VA practices deny veterans personal hearings, subpoena power, expert independent medical testimony, access to medical files, records and regulations, the right to cross examine, etc. Meanwhile the Agency maintains the integrity of its quota system (12.7 % allowance rate, year after year with little change) subjecting veterans to conflicts of interest, frustration, bias, intimidation, incompetence and worse.

Annually the Veterans Administration publishes information re: the awards that veterans receive with respect to their Board of Veterans Appeals (BVA) claims, which approximate between 30,000 and 40,000 each year. The most recent 12 year results are shown, as follows :

	Year	Success Rate
1.	1976	12.7%
2.	1977	12.7
3.	1978	12.5
4.	1979	12.7
5.	1980	12.4
6.	1981	12.4
7.	1982	13.0
8.	1983	13.7
9.	1984	13.8
10.	1985	13.3
11.	1986	12.8
12.	1987	12.9 (3 qtrs.)

note : Even the 13 % average rate of success is a myth, bad as it is. Veterans fare much worse predicated on recent VA correspondence acknowledging that " if, in a four issue appeal, three issues are denied and one issue is allowed, the VACOLS record will regard the BVA decision as an allowance."

Such relatively constant results could be achieved only via the imposition of a quota system of dispensing justice. For the years of 1976-1981, the laws of probability would make the odds of obtaining success ratios in such close proximity year after year, as being over a trillion to one. Much more, if we were to include the remaining years.

The statistics while not wholly dispositive of a quota system, do however, provide a statistical basis for making that assumption. It must be recalled, that while there is no scientific or medical link between cigarette smoking and lung cancer- there is statistical evidence to suggest its validity. In this instance, the statistical evidence is overwhelming. How could such statistics be anything but indicative of a quota system ? What other possible explanation is there ?

Startling, was then Associate Supreme Court Judge, William Rehnquist's observation in the NARS case, that it didn't seem to make much difference who represented veterans since all of the NVSO's, the American Red Cross, agents, attorneys or those self represented seemed to fare equally well. Probably, a chimpanzee would too - under a quota system. Obviously, the Judge did not understand that he was looking straight at a quota system where everyone gets their fair share under the " quota umbrella ".

From all of the available evidence, it is absolutely clear that the VA monitors the numbers and types of claims awarded. For example, when it was deemed that Puerto Rican veterans were obtaining 100% disability (PSTD) claims in excess of the national averages, immediate steps were taken by the VA to remedy the perceived excesses - irrespective of how harsh or unjust the remedies were. Similar evidence was obtained during the early NARS testimony from a VA employee concerning other perceived excesses which immediately triggered a Central Office investigation and remedial action.

Incredibly, no evidence is available indicating that the VA took remedial action where veterans benefits appeared to be substantially below the national averages - only over, the averages. There is one exception, however - pertaining to veterans residing in Arkansas and Mississippi - where huge, unexplained, over the national average, disparities in benefits awards exist. (more later).

The Board of Veterans Appeals, (BVA) in furtherance of its quota system, has adopted unusually creative (immoral, unprofessional, possibly illegal) practices to include : panel expansion (court packing or deck stacking), panel (court) shopping, courtesy decisions (signing off on decisions, not examined), productivity (not quality) awards, and other surreptitious practices to sustain their 87.3 % denial rate. The VA approves of these practices, on the premise that it is safer to deny than approve claims.

Although the VA vigorously denies that it has a quota system, the evidence is irrefutable. So what if they call it economic prudence control or damage control or claim control or some other egually disingenuous bureaucratic name. Would a rose by any other name, smell half so sweet ? Would a wolf in sheep's clothing, be anything but a wolf ? If it looked like a duck, walked like a duck and quacked like a duck, what would it be ? **A quota system !**

Interestingly, the Washington Post reported in an article published March 13, 1988 that a number of government agencies and private businesses operate quota systems, but strenuously deny their existance. The New York City Police department, the IRS, Newspapers, etc. So the VA's denial of the practice is not that unusual. No one wants to admit what many practice and wish to keep secret and away from public attention. For that matter what government agency would willingly acknowledge justice by quota ? So the VA doesn't have a quota, what's new ?

Potential for Abuse

The Veterans Administration has been uniquely placed above the law by ill considered and " unconstitutional " laws which insulate its decisions from judicial review. Moreover, it vigorously asserts, that it needn't account to anyone for its actions or procedures.

Recently, the VA went so far as to declare, pursuant to a hypothetical question framed by a Circuit Court of Appeals Judge sitting , en banc, - that 211 (a) barred court jurisdiction of VA practices even if claims were denied solely on account of gender, race or color !!? The constitutionality issues being contested remain under consideration by the Court, while more and more and constitutional type actions are being planned.

Emboldened by such perceived unrestrained license, the VA - after fifty-five years, has clearly run amok with unbridaled power. The potential for abuse under such circumstances would not have surprised Lord Acton who concluded that : " Power corrupts, and absolute power corrupts, absolutely ! " It should not now surprise the Congress that the VA (its creation) claims more power than the Congress has to bestow.

Is that what Congress intended ? More importantly, what does Congress intend to do about it ? Congress spawned this bureaucratic monster, now it's up to Congress to bring it to heel and quick, before it consumes us all !

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Veterans Administration's 27 Unfair Practices

The Veteran's Administration (V.A.) has subjected veterans to unfair practices and procedures for the express purpose of maintaining the integrity of their quota system of dispensing justice. In the process thereof, the V.A. has adopted **unusually creative, deceitful and cunning practices** designed to cause veterans to abandon perfectly valid claims in utter confusion, anguish and frustration- overcome, by a deep sense of betrayal. Practices so unfair, that in their **totality** serve to **deny** veterans a **fair and impartial hearing.**

Enumerated below are but 27 of those unfair practices- either engaged in or supported by the V.A.- in **collusion** with the American Legion, VFW, DAV :

1. No right of **judicial review** or to have their claims litigated in a court of law based upon their individual merits- irrespective of how arbitrary or capricious V.A. decisions may be.
2. No right to **retain an attorney** in V.A. claim actions. Attorneys who accept more than ten dollars are subject to **imprisonment for two years** at hard labor and a five hundred dollar fine. Under such circumstances, no attorney will pick up the phone today- much less represent veterans for ten dollars.
3. No right of **subpoena.**
4. No right of **cross examination.**
5. No right of **independent appeal.**
6. No right of **independent medical testimony** to resolve differences in medical opinion.
7. No right to compel V.A. to **address** or confront **evidence.**
8. No right to copies of V.A. **regulations** utilized against them.
9. No right to **discuss case** with the V.A.
10. No right to obtain **answers to questions** whether written or oral.
11. No right to **investigate** or explore reasons for **missing files** or records which could prove beneficial to claimant.

12. No right to **personal hearings**, despite regulations to the contrary.

13. Claims are often denied for failure of veterans to **answer correspondence** which was **never sent.**

14. Inordinate **delays in answering correspondence-** often replies take three months and more.

15. **Responses** are often vague, obtuse and couched in bureaucratic language **devoid of meaning.**

16. **Questions** which are deemed repetitive, are **not answered-** despite the fact- that no answers were forthcoming previously.

17. Little or **no assistance in developing claims** is provided veterans despite voluminous Congressional testimony to the contrary.

18. V.A.'s version re: recitation of the facts is **always accepted** contrary to any evidence introduced by the veteran contradicting their alleged facts.

19. In a rush to judgment, V.A. often **renders decisions** without benefit of the service or medical records and **without any facts** bearing upon the merits of the claim.

20. **Hearings** are often held **without notification** to the veteran. A check mark, denoting some unnamed Veterans Service Officer's presence, is the only indication that some representation was afforded the veteran. Often the hearing record fails to disclose whether the alleged representative said or did anything in the veteran's behalf.

21. After hearings are conducted, **decisions** are often rendered **by personnel not present** at the hearing.

22. V.A. **employs 800 attorneys** to represent the government's interests, but the veteran is **not entitled** to any meaningful legal representation.

23. V.A. rules, regulations and operating procedures are **complex,** confusing, contradictory, voluminous and subject to **constant change.**

24. On occasion, unqualified or **incompetent Doctors** are hired- and placed into sensitive positions requiring them to render **medical judgments** at the speed of one or two per minute. Often such medical personnel are unable to secure employment elsewhere and consequently, **easily intimidated** - into accepting V.A. requirements for " agency favored medical opinions ".

25. Veterans are not granted the **benefit of the doubt** despite rules, regulations and sworn testimony to the contrary. Many times, there isn't a doubt, but still claims are denied.

26. In a desire to deny claims, the V.A. often **invents medical theories** out of whole cloth. Such theories, usually **defy** past or current **medical wisdom** or any likely thereafter.

27. Claims before the Board of Veterans Appeals are **successful in only one of eight claims.** The allowance percentage rate of 12.7 % **never seems to vary** much over the years - no matter how many claims there are- usually, 30,000- 40,000 per year. The percentages which are in such close proximity year after year strongly suggest the **imposition of a quota system** of dispensing justice.

Moreover, it **doesn't seem to matter** who represents a veteran- whether the American Red Cross, the American legion, VFW, DAV, self, attorney (pro bono) - the failure rate of 87 % remains constant.

Damaging Testimony: Repeatedly Ignored by Congress.

The Congress on numerous occasions was confronted by testimony critical of the VA's handling of veterans' claims- but, each time did little or nothing to investigate or meaningfully inquire into the shortcomings and deficiencies reported. For example:

1. **Mr. Kenneth Blaylock,** Pres. of the AFGE with 116,000 VA members testified on pages 330, 331 of the November, 1980 HVAC hearing book, as follows :

   a) **Considerable dissatisfaction** exists among our membership concerning the lack of judicial review.

   b) Veterans have been relegated to **second class** citizenship.

   c) A **demonstrated need** exists for the VA to be subject to judicial accountability.

   d) **Available figures** indicate that veterans making an appeal to the BVA are under a serious disadvantage.

   e) **Large numbers** of veterans do not appear to have been granted the benefit of the doubt on any consistent basis.

   f) **Informality** combined with the absence of precedence leaves wide discretion for inconsistent and uncontrolled decision making.

g) The **absence of court review**, precludes any effective institutional check on arbitrary or impermissable action.

Inexplicably, no member of the Congress, to our knowledge, asked Mr. Blaylock for the source of his information or what evidence he had to support these allegations. Obviously, it must have come from his union members, what other sources could there have been ? Mr. Blaylock would not talk to us, perhaps the Congress will now pursue his important testimony.

2. **An ex-BVA employee**, Norman Johnson wrote to Senator Alan Cranston on October 11, 1977. That letter was introduced into the November, 1980 HVAC hearing testimony. Highlights of Mr. Johnson's testimony follow:

a) **Mr. Johnson said** that he was required to " shelve my notions of professional objectivity and procedural due process".

b) **Learned** that there was a covert quota system in effect.

c) " **Job performance** was rated by the number of decisions written in a given week. .....each week a tally was circulated to all personnel showing the number of decisions produced by each attorney and for each of a dozen or more sections of the Board. There was clearly a competiveness..."

note: Mr. Johnson wrote the above in 1977. Today the same things are being said by VA employees, Messrs. Abrams, Boscovitch, Kinney, Deep Throat, Wright and Biderman et al. In fact hundreds of VA employees would be willing to spill their guts, if only Congress would ask them a question !

d) " **Inconsistency of decisions** is a major shortcoming of the Board and its processes."

e) " **case decisions** were haphazard, unfair and probably illegal ".

f) **Specifically**, denying claims " for service connection where the service department could not produce any medical records. This was not an infrequent problem, and surely many valid claims were refused on these grounds. To cover the situation and the embarrassment of the loss of the records, the opinion would recite something to the effect : [" Service medical records do not indicate treatment for claimed injury. "] Such evasion was common in cases where there simply were no records. "

note: Yet, another example of disengenuous bureaucratic gamesmanship practiced on helpless veterans.

g) " **A number of proferred decisions** were reversed by the section chief because the facts were not overwhelming and the veteran's records showed infractions of military discipline, even minor ones. "

note: What happened to benefit of the doubt consideration standard mandated by the Congress ?

h) " **Biases** and individual standards of panel members affected the decision - and would differ from one section to the next." (so much for uniformity in decision making)

i) " **On questions** of permanent and total disability claims, my section was tight. When the facts were close, the decision always went against the veteran, although the statutes mandate a liberal interpretation."

j) **Some decisions** were based upon racial considerations.

k) " **Veterans deserve** equal and fair treatment and they will not get it until the current scheme is opened to review on an independent judicial process. "

Neither the Congress nor anyone else sought to question Mr. Johnson concerning the validity of his remarks. Today, there is substantial corroborative information to support much, if not all, of Mr. Johnson's testimony.

3. **Mr. Donald Schwab**, of the VFW in testimony given before the HVAC, November 19, 1980 , on pages 290, 291 of the hearing book was highly critical of the VA, complaining - as follows:

a) " **a system** which permits welfare, or supplemental security income recipients to seek court relief but denies the same forum to veterans is flawed. "

b) **Many veterans** believe " that they have not received timely, full, fair and impartial consideration of their appeals. "

c) " **In the absence** of substantiating service medical records " buddy statements " by former prisoners of war and other knowledgeable witnesses are nearly always discounted, as having been made from remote memory. "

d) " **One of the most** frequently heard complaints .... is the complete frustration of those whose claims have been denied due to 38 USC 211 (a)."

e) " **Many service officers** are increasingly disappointed in the denial of cases which have considerable merit. Also,they wonder why, over the past eight years, the percentage of cases allowed by the Board of Veterans Appeals has fluctuated only a little over 2 per cent whether that body considered 25,000 cases in the year or more than 35,000 cases. The average allowances have been 12.8 per cent of the cases considered. In the last four fiscal years, the variance has been only two-tenths of 1 percent in that allowances in 1976, 1977, 1979 were 12.7% and in 1978, 12.5 %, in 1980, 12.4 %. "

note : The allowances remain virtually identical up to the present time. Mr. Schwab made no mention of a quota system, yet he intimated there was one. Noteworthy, is the fact that Mr. Schwab has not testified again. Could it be that he was no longer considered reliable or trustworthy, and why - because, he told the " awful truth " ?

4. **Veterans Due Process** introduced into the HVAC hearings of June 25, 1986, the first of two " deep throat " anonymous letters sent to Mr. Gordon Erspamer, Nars lead counsel. Deep Throat's " whistle blowing " letter laid bare some of the onerous tactics used to frustrate and intimidate veterans into abandoning perfectly valid claims. Some of the abusive tactics described, are as follows:

a) **using deception** to deny hearings at crucial and sensitive stages of the adjudication process. Later perpetrators rewarded with exceptional evaluations, promotions and merit bonuses.

b) **rubber stamping** of medical rating decisions at the speed of one or two per minute.

c) **denying claims** for failure of veterans to respond to correspondence never sent.

d) **Fraudulently enhancing** productivity performance records to achieve merit bonuses and to promote empire building schemes.

These tactics were creatively and cunningly developed over a great number of years for purposes of safequarding the VA's quota system of non- adversarial injustice.

Deep Throat's credibility must be pretty good considering The District Court in San Francisco - accepted his version of the facts, contained in the second letter, advising of the destruction by the VA of sensitive documents requested under court order. The Court subsequently fined the VA $ 145,000 for that transgression and was forced to employ a Special Master for purposes of insuring fair play concerning future requests for evidence.

If the VA pays no attention to Court orders, what attention will they pay to powerless veterans interests and concerns ?

5. **On March 17, 1987** before a joint session of the Senate and House Veterans Affairs Committee, VA employees Ronald Abrams, Barry Boscovich and Thomas J. Kenney testified to the following :

a) **veterans** are not being treated fairly in accordance with the VA's own rules.

b) **claims** are being prematurely denied without advising veterans of their right to appeal.

c) **claims** are being denied for failure to provide unnecessary information.

d) **veterans** are often required to furnish service records which are the responsibility of the VA.

e) **veterans** are requested to provide income statements although this information was irrelevant to the claim.

f) **veterans** who supply income statements can be denied for reporting excess income although income is irrelevant to the claim.

Startling was the revelation by Mr. Abrams, of a case uncovered in the St Petersburg office, regarding a Korean veteran who had lost both legs in combat and had not yet (to his knowledge) received his benefits. It was Mr. Abrams understanding that the claim had not been allowed because of the veteran's failure to supply information which the Agency was obligated to provide. Also startling, was the Joint Committee's apparent failure to inquire into the current status of the matter.

Egregious Cases.

The NVSO's have repeatedly testified that the VA's non-adversarial system is fair and that, on occasion, a few claims fall through the cracks. Our contention, is that it's more like a yawning chasm or deep abyss, as some of these examples will attest :

1. **Tracy vs Gleason,** 379 F 2d 469 (1967) was a case which ultimately went to the U.S. Circuit Court of Appeals for the District of Columbia. In this action, the veteran's estate sued for the retroactive payment of benefits which were alleged to be wrongfully withheld by the VA. It seems, the VA terminated benefits originally awarded Mr. George Tracy because he failed to return an income questionaire. At the time , however, Mr. Tracy had been confined to a mental institution for 12 years. The VA knew he had no income from prior replies. Despite the hospital Acting Superintendent's letter advising of his mental condition, and lack of earnings - the VA cut off his benefits.

Inexplicably, the VA files already contained the income information for about three-fourths of the year to which the questionaire pertained. The pension application contains the following questions and answers :

> Question- 8 (c) " Names and addresses of former employers for last 12 months. "
> Answer - Hospitalized since June 30, 1936.
>
> Question- 8 (e) " Give total income for last 12 months received from :

Employers	Answer : None
Self-employment	Answer : None
From All sources	Answer : None
Value of Estate	Answer : None

> Question- 9 (c) If you had employment could you work full time ?
>
> Answer: No
>
> Question - If not, why ?
>
> Answer: Hospitalized.

Question - Part-Time ?

Answer: Hospitalized.

Question - If not, why ?

Answer: Hospitalized.

The wonder is, how this matter ever got to the Circuit Court of Appeals ? What of the checks and balances ? How could the VA permit such a miscarriage of justice ? How could the General Counsel, the VA Administrator and the Justice Department attorneys, all fall flat on their faces ? Was this really a case of someone falling through the cracks or was this simply a case of cruel arrogance and unbridaled power ?

Wonder of wonders, the veteran's estate actually won this case in the Circuit Court of Appeals after losing in the District Court, which claimed lack of jurisdiction under 211 (a).

The Circuit Court of Appeals said " In our opinion the complaint tells a story of arbitrary and capricious action on the part of the officials : a) the Administrator acted arbitrarily in the circumstances when he terminated the pension of Tracy because that unfortunate, totally disabled by insanity, had failed to return an income questionaire; (b) the Board of Veterans Appeals acted arbitrarily in affirming the termination after it had learned the facts; and (c) the Administrator had acted arbitrarily in failing to make payments for the full period of discontinuance after he had been told what he should have known before: that Goerge Tracy was insane and was totally and permanently disabled in 1949 and continuously thereafter. "

The Circuit Court was able to grant judicial review, and consequently, justice under a loophole involving a distinction between a mere claim (not yet awarded) as opposed to the forfeiture of an already adjudicated award. Later Congress closed this loophole - in the middle of the night - and Veterans were denied their last chance at fairness and justice under judicial review.

Why did Congress foreclose the Veterans' last chance at justice ? Why did our NVSO's permit it, in the light of such cases as Tracy v Gleason, and many more which they were privy to ?

2. **A recent case** (name withheld) involved a veteran who fell off a telephone pole (line of duty) thirty-three years ago, fractured his back and suffered herniated disc injuries. The VA denies his back is fractured and contends that his injury was sustained prior to service.

The unassailable facts are :

a) **The veteran was** a top baseball prospect of the Boston Red Sox at the time of his induction and never sustained a prior injury, as evidenced from the service pre-induction physical ; from his family doctor of 40 years; from his army record prior to injury.

Despite the VA's contention of a prior injury, not one piece of evidence has been presented to support their position.

b) **X-rays, Cat Scans, MRI's evidence** substantial damage to the veterans' back contrary to the VA 's opinion of little or no injury. The VA denied him Cat Scans for over six years necessitating their being taken privately at great financial hardship. Inexplicably, several VA physicians, who shall remain nameless, deliberately misread his Cat-Scans- requiring several outside confirmations to be performed.

During one instructive episode, the veteran brought a private Cat Scan and a report thereof to a VA Doctor. Upon examination, the Doctor proceeded to give the veteran a perfect verbal reading pointing out the disc herniations, fracture and spondylolisthesis in conformance with the private report. Thereupon the Doctor wrote in the veteran's records "positive for disc disease only ". When the veteran asked why the Doctor didn't write down what he told him ? The VA Doctor replied :

" I can't write down what I told you. It would make the whole orthopedic department look bad since we refused you a Cat Scan for 6 1/2 years and misdiagnosed you ! "

That brief encounter sums up the situation as much as anything could, but other VA Doctors deliberately or incompetently persisted in the misdiagnosis. Only the threat of a mal practice suit against the Doctors caused some changes in their recitation of the medical history. There is much more available on this wilful miscarriage of justice, should the Committee request it.

The treatment accorded this veteran's claim and person, evidences far more than someone falling through the cracks for 33 years. It evidences systemic and callous disregard for the welfare and interests of veterans and an astonishing degree of incompetence (if that's what it is) which requires immediate attention.

3. Sgt. Ronald Beck, a much decorated hero of the Vietnam war took his own life several years ago when it was apparent that the VA was totally insensitive to his war related injuries.

a) **Sgt. Beck's compensation** was first wrongfully reduced-then erroneously cut-off. Not wishing to become an added burden to his family, overcome by despair and hopelessness, he simply ended his life saying he could fight the Viet Cong but not the VA.

b) **The VA not content** with their wrongful, and outrageous treatment, sought to collect $ 1800 - an alleged overpayment which likewise was erroneous. Despite the fact that Sgt. Beck did not owe anything - and in fact was underpaid, he was precluded from pleading any defense.

c) **Several days** after his death, the VA tragically acknowledged that it was all a horrible mistake. Sgt Beck used the services of the DAV, who got it all wrong or didn't much care. The weeks grew into months and ultimately the callousness and lack of concern exhibited by the VA and DAV operating in concert was more than he could bear.

d) **During the course** of his VA created problems, Sgt. Beck required substantial surgery re: his war injuries which the VA wouldn't sanction. The surgery was absolutely necessary, as determined by several private medical specialists, contrary to the VA's opinion. Nonetheless, the operations were performed to alleviate his pain and suffering. All the VA could offer was - drugs and more drugs.

e) **Fortunately**, Mrs Beck had private medical insurance which covered her husband. The cost of $ 18,000, however, was approximately, $ 2800 more than the insurance company would agree to pay. To this day, the VA whose responsibility it was - to pay the entire amount or $ 18,000 - has refused to pay even the outstanding balance of of 2,800.

f) **The VA knew** that Sgt. Beck, an extremely proud man, had developed suicidal tendencies resulting from his feeling of inadequacy, drugs, mistreatment and unrelenting pain which prevented him from sitting comfortably. The VA and DAV knowing this, failed to take his condition into consideration and treated this American hero with all the indifference and disdain someone might show a cockaroach.

We recognize that mistakes can be made - but the VA and Service Officer's have seen so much of this - growing accustomed and insensitive to the pain and suffering which surrounds them. How could this tragedy occur ? What meaningful investigation has been performed ? What's to prevent its recurrence ? Nothing !

D. Truth in Recruiting: Requirement To Warn

Youngsters and their families are not advised prior to entering the United States Armed Forces that injury sustained therein will deny them access to the system of justice they sought to defend. If injured, such injury - will compel them to seek relief under title law # 38 which denies them access to the Courts and an attorney of their own choosing. Further, the VA operates under practices and procedures contrary to the spirit and intent of the Framers and the U.S. Constitution; and in the process thereof, denys veterans a fair and impartial hearing.

1. **Advertisements inducing** youngsters to join the Armed Forces advise of numerous advantages to be derived therefrom, but not one word of warning re: constitutional deprivation in the event of injury.

2. **Warnings, disclaimers** and disclosure statements abound re: credit, liquor, tobacco, household products, skating rinks, all-terrain vehicles, real estate, stock brokerage track records, etc.

3. **Warnings (Miranda)** are provided suspects advising them of their constitutional right to obtain an attorney and to remain silent. Failure to warn under such circumstances is considered so serious that charges pursuant to the crime must be dropped, absent a warning regarding the suspects constitutional rights.

4. **No one** entering the Armed Forces has been warned that, if injured, they will forfeit their constitutional right to an attorney and to petition the court for redress of just grievances.

Unless Congress restores veterans' first class citizenship rights, legislation should be immediately passed requiring youngsters and their families to be warned. If there must be " Truth in Lending " why not " Truth in Recruiting " ; unless, of course, the Congress wants to conduct a shell game ? In this regard, it's doubtful whether the NVSO's (for obvious reasons) would wish to openly lobby against a " Truth in Recruiting " bill.

If murderers, criminals and traitors must be warned of dangers to their constitutional rights, why not youngsters and their families ? That's the least Congress can do !

Implausibility of NVSO Arguments Against Judicial Review

1. Well Wishes and Good Intentions !

NVSO's : Assert that the V.A. has the veterans best interests at heart, leans over backwards in their behalf and that no further protection is needed.

Veterans Due Process : Submits that the V.A. is riddled with impermissable action nurtured by a lack of judicial review and legislative oversight. Examples of rubber stamping of medical rating decisions, procedural shortcomings, conflict of interest, productivity requirements, budgetary constraints, bias, etc. have all contributed to a climate of doubt and suspicion regarding the Agency's good intentions. The old bromide would appear to apply:

The Road to Hell is paved with good intentions !

2. The Non- Adversarial System or What Price Informality !

NVSO's: Assert that the system's non-adversarial procedures and informal atmosphere works to the benefit of veterans.

Veterans Due Process : Submits that the system is adversarial and should not be confused by its non-confrontational nature. Frankly, what good is a system which refuses to address your evidence or contentions or denys subpoena power or cross-examination, etc. Under such circumstances, veterans have no way of ascertaining how the Agency arrives at its decisions -or what facts were used- and how the facts were reconciled to its conclusions. Is it any wonder, that some veterans have pursued claims for over forty years and still can't find out why they lost. Is it any wonder, that Congressmen enlisted to assist veterans- can't find out either !!? This system is above the law and needn't explain or answer to anybody !

Honestly,what good is a system like that no matter how informal ?

3. The Myth of V.A. Medical Expertise.

NVSO's: Assert that the V.A.'s special medical knowledge permits them to evaluate claims with greater understanding.

Veterans Due Process : Submits that the V.A. has no special medical expertise, and any it may have, is held hostage to a quota system, budgetary constraints and productivity requirements. Incredibly, the V.A. has often expressed medical opinions contrary to the medical wisdom of that day, decades before or anytime thereafter- but, steadfastly refuses to admit error. Outside medical expert opinions advanced in support of veterans, are routinely ignored in favor of a V.A. general practioner's opinion adopting the Agency line.

The Quota System or the Benefits of Budgetary Constraints.

NVSO's : Assert that there is no quota system of dispensing justice at the Board of Veterans Appeals (B.V.A.).

VETERANS DUE PROCESS: Submits that veterans are wary of a system which operates at a 12.7 % claim allowance rate which seldom varies over the years. Also, veterans are suspicious of system in which claimants prevail equally well -whether they're represented by themselves, an attorney, a national service organization or by a chimpanzee ! The fact is, the V.A. has a quota system and it doesn't make a particle of difference who represents you- although, it should.

Lack of Legal Representation or the Blessings of Dying Intestate!

NVSO's : Assert that veterans are better off, if they don't have to share their benefits with unscrupulous attorneys.

VETERANS DUE PROCESS: Submits that the only veterans seeking legal counsel-had already lost, and were now seeking professional representation. Apparently, the NVSO's can't understand that it's far better to obtain 75% of something rather than 100% of nothing.

The reason for denying veterans legal representation gets to the heart of the matter. The V.A. has 27 unfair practices which serve to deny veterans a fair and impartial hearing. If attorneys were permitted to practice routinely before the V.A., they would complain to their local bar associations about the lack of due process: no right of subpoena; of cross examination; of independent appeal; of outside expert medical testimony; of etc. etc.

The legal profession simply could not tolerate such an unfair system and doubtless would lobby against it. Also, the American Legion, DAV and VFW are fearful that veterans would seek assistance from attorneys rather than join their organizations.

Veterans dispute statements which declare that they would be better off without attorneys, while the V.A. employs 800, all of whom seem bent on denying their claims.

Court OverCrowding or What Price Justice !

NVSO's: Assert that the Courts are overcrowded, and if veterans were permitted access to the courts- the costs, would be prohibitive.

VETERANS DUE PROCESS: Submits that veterans should not be denied access to the system of justice they fought to protect; nor are they responsible for the overcrowding, having been excluded from the courts for the last 55 years. The day when justice is deemed secondary to other considerations, will be the day that America is no longer America. Under such circumstances, we will have broken faith with the " Framers " and our Republic will be nothing more than memory.

Why are the NVSO's more solicitious of the Courts well being than they are of veterans ?

Why weren't the NVSO's leadership concerned with overcrowding when 145,000 veterans were hauled into Court by the VA in an endeavor to collect alleged overpayments, and why won't they permit veterans to return the favor ? Why aren't the NVSO's concerned when veterans aren't permitted to plead a defense ? Overcrowding doesn't appear to be an issue when the VA utilizes the Courts against the veterans only when the tables are turned .

What did Senator John Glenn mean in a recent Senate hearing (March 28, 1988) considering whether a judicial review amendment should be added to the VA Cabinet level status legislation, when he said to the NVSO leadership in the audience : " Go back and review your position on judicial review " ?

Senator Glenn continued : " I'll tell you, it just isn't right that we treat veterans as second-class citizens in this country ! I think, I as a veteran, deserve the same treatment as other Americans. I should think the veterans organizations would be in here **clamoring** for judicial review, not standing in its way. "

Senator Glenn's statement, more than any other recent statement, originating from the Congress, sums up the perplexing and bewildering incongruity of the NVSO's leadership position on the issue of judicial review.

Numerous other matters divide us from the NVSO leadership on judicial review, but the issues enumerated - are believed to be the most important.

The facts remain, veterans have no legal right to medical care or to compensation for their war related injuries. Sooner or later these injustices must be addressed before further damage is done to the social contract between the citizen and his government.

Is Mississippi, the Promised Land of Veterans Benefits ?

Inexplicably, the chance of obtaining service connected V.A. pensions in Mississippi and Arkansas appears to be twice as great as anywhere else in the U.S. Further, the average pensions granted there are considerably higher too - 30 % greater in Mississippi; 43 % greater in Arkansas.

Non-service connected disabilities likewise fare extremely well; 2.3 X the national average in Mississippi; 1.9 X in Arkansas. Incredibly, there are 72 % as many Non-Service connected claims in Mississippi as there are Service connected claims; in Arkansas, 60 %. The national average is only 31% which means that Mississipians are either sicker or smarter than everyone else.

What explanation can there be for this blatant favoritism ? Deference paid to veterans residing in Mississippi and Arkansas should come as no surprise to students of the V.A. and the House Veterans Affairs Committee (HVAC). Cong. G.V. Montgomery (D. Miss.) is the chairman of the HVAC while John Hammerschmidt (R. Ark) was its ranking Republican member. Seniority and power obviously have an impact on what veterans receive and from which state.

How could such blatant favoritism take place without arousing the ire of the country ? The awful truth is, that no one is watching the V.A. or analyzing its operations. Not the Congress; not the Press; not the Courts- not the States- not the NVSO's- not anyone !

Apparently, based upon the benefits dispensed in 1985, States such as California are being **short changed** $ 310 million, per year; Illinois, $ 204 million; Indiana, $ 70 million, whereas Mississippi and Arkansas are riding the " gravy train" . No satisfactory explanation has been offered to explain such large pension descrepancies.

Mississippi has provided the armed forces with the lowest number of service men (92.1 per thousand) whereas the national average is 118.2 per thousand of population. Yet they receive more claims and **higher per capita** benefits. No wonder Cong. G.V. Montgomery says the system ain't broke ! It does all right for Mississippi and Arkansas.

Accordingly, based upon the 1985 VA numbers, Mississippi is last in war but first in the hearts of the VA.

Note : All numbers and relationships developed therefrom were extrapolations derived from the V.A. Fiscal Year, 1985 reports furnished the Congress.

American Legion Financial Secrecy Act

U.S.C. Title Law # 36, Chapter 3, Section 49 says that " The said corporation (American Legion) shall, on or before the 1st day of January in each year, make and transmit to the Congress a report of its proceedings for the preceding calendar year. Said report shall not be printed as a public document."

Only a few highly placed individuals in the American Legion are believed to have access to *the financial statements. Staff* members of the House and Senate Veterans Affairs Committee professed to have little or no knowledge of what the financial reports contain, although some promised copies- none were forthcomimg.

What was the intent of Congress in keeping the American Legion's financial statements a secret from its members ? What purpose does it serve ? What is accomplished ? Who profits ? What activities are being fostered under the guise of secrecy ? What is being hidden ?

Surely American Legion members and the American people have a right to know where this tax exempt organization gets its income and what is done with it. What of salaries, perks and other goodies given to the leadership ? What assets are owned ? What causes are supported and how much is spent on each ? Who are its ouside auditors ? What of their relationship to huge insurance interests ? For that matter how much is known of the people who actually run the American Legion ? It's all a mystery rivaling the origin of the Nile river.

Title 36, chapter 3, section 49 enacted by the Congress is censurship practiced without rhyme or reason. Surely Congress owes the American people some explanation for the secrecy surrounding the American Legion's financial condition.

VA Blackmail Letter, June 5, 1986 and Relevant Facts

Gail Gomp , Director, Intergovernmental Affairs letter to the NVSO's, soliciting their cooperation in defeating HR 585, after similar legislation had passed the Senate unanimously, was a veiled threat evidencing blackmail. The significant portion, extracted from her ten page letter is as follows :

> " Moreover, many special considerations currently extended to veterans service organizations may have to be curtailed. The providing of VA space and facilities, informal access to adjudicatory personnel, etc. could be affected by judicial oversight and increased representation by private attorneys. "

What adds credence to this veiled threat is U.S.C. Title Law # 38, Section 3402 (2), otherwise known as the Blackmail and Intimidation Clause (BIC) which says : " The Administrator may in his discretion furnish, if available, space and office facilities for the use of paid full-time representatives of national organizations so recognized. " That awesome power, in the hands of the VA Administrator, represents big money to the NVSO's and creates an inherent conflict of interest.

The purpose of this once " secret letter " was to advise the NVSO's leadership that in their own interests (not members) they should lobby against H.R. # 585, a House bill, granting veterans access to the courts and the right to retain an attorney of their own choosing. Otherwise, the leadership could jeopardize the free services granted at the sole discretion of the VA Administrator.

At the time, there were 233 Co-sponsors of the bill in the House and a conservative estimate of 400 votes (out of 435) in favor, if it reached the floor. The VA was desperately trying to kill this bill, which they feared, with good reason. Hence, the blackmail letter. The measure had previously passed the Senate four times without a dissenting vote.

Free services consisting of : free rent, electricity, phones, supplies, etc. provide a basis for increasing NVSO membership rolls; also, creating a clear conflict of interest when representing veterans. How vigorously can NVSO's contest veterans' claims with the sword of Damocles hanging over their heads ? What must the NVSO's do to ingratiate themselves with the VA ? What do you suppose turned the NVSO watchdogs into lap dogs ? Obviously, the NVSO's can not strongly represent veterans for fear of antagonizing the VA and risk being tossed off the " gravy train " .

Another aspect of the blackmail portion of the Gomp letter which doesn't get much attention but is nonetheless significant, is - " informal access to adjudicatory personnel ". Does Ms. Gomp mean, that self represented veterans or veterans with attorneys or agents lack this privileдge ? If so, Congress should look into this practice since it would appear to be a breach of equal treatment under the law.

Moreover, Congress should seriously consider either giving the NVSO's the free space and services outright - removing the VA's Administrator's sole discretionary power - or, eliminate the free services altogether.

Summary

Common sense requires the Congress to take a serious look at Judicial Review. Never mind what the NVSO's say, they don't represent their members on the issue of Judicial review- common sense, tells you that. Their magazines and publications ignore judicial review although the subject is of immense importance to their members, and why ? NVSO statements in the Congress opposing judicial review are ludicrous, yet Congress treats them with great deference, as if their words descended down from Mt. Olympus. NVSO's won't debate this issue with us, because they can't. They would be laughed out of any serious forum in America.

Certainly, no American would willingly wish to be a second class citizen and deprived of rights accorded traitors and criminals ? Surely no war injured American veteran believes that his benefits are "gifts" while welfare recipients receive entitlements. Try explaining that to some of these veterans ! If there are any veterans out there who agree with their NVSO leadership, we can't find them. Their leadership has no grassroot support, once the issues are understood.

Of course, the NVSO's can swamp the Congressional switchboards with messages exhorting the Congress to vote down judicial review - but, if someone, takes the time to explain what judicial review seeks to accomplish - there is no problem. After all, veterans may ignorant on the issue, but they're not stupid.

We know of no other issue which has obtained such overwhelming support in the Congress, but which - was not enacted into law. Even an administration veto would not prevail against the overwhelming sentiment favoring judicial review. Five times the full Senate passed judicial review ; four times unanimously. Four times the

House Veterans Affairs killed it in committee; the last time in 1986, with 233 co-sponsors. Is it possible, that one man can thwart the will of the Congress ? It certainly seems so.

None of this could happen if the American people knew of the issues involved. Unfortunately, the Press hasn't reported and Congress hasn't spoken out on the issue, and why ? Judicial review is one of the best kept secrets in America. It's even a secret from its victims, who believe only that a tragic mistake was made in their case - having no idea that VA abuse is massive and systemic. Moreover, having no idea that their NVSO's leadership betrayed them. Where would this knowledge come from ?

The Press has been silent, a victim of its own self- inflicted ignorance. Not a single newspaper has any full time personnel assigned to veterans affairs. Lacking credible, informed information, the editorial (newspaper) staffs avoid comment, except to decry veterans lobbies and their excesses.

Lack of newspaper coverage deprive Americans of knowledge relating to the massive due process violations experienced by veterans daily. An iron curtain of silence has descended over veterans' affairs. No newspaper investigative reporting ; no meaningful Congressional inquiries ; no government or agency examinations ; nothing of consequence - and this, the largest scandal in the history of the United States. All the while, the NVSO's sworn to protect the interests of their members - applaud and support the Agencies rape of veterans rights from a safe distance.

With a cast of millions, a budget in billions and a barn door wide open, could this be anything but the largest scandal in our nation's history ? With an **old boy revolving door** network occupying sensitive positions on all sides of the Iron Triangle. With the NVSO **"watchdogs"** turned into **"lap dogs"** by the Agency's largesse given at the VA's sole discretion. With the American Legion's financial statements **kept secret** from its members by order of the Congress. With **benefits double** the national average extended to the resident veterans of Mississippi, whose Congressman happens to be Chairman of the HVAC. And with **parties and favors** routinely exchanged among members of the Iron Triangle. What we have, is an **American tragedy** of herculean proportions nurtured by monumental neglect and apathy -potentially, adversely impacting our national defense.

Despite massive evidence of wrong-doing, the Attorney General won't act; neither will the Inspector General's office nor will the GAO or any other investigative agency of this government. The only recourse remaining, is for veterans to assert their right to a day in court with every resource at their command.

Anything else - is a fraud, a sham and a farce.

The Congress which has, so far, failed to protect the interests of the American people and veterans on the critical issue of judicial review, should be reminded of George Washington's relevant statement :

> " How the war veteran is perceived to be treated will directly affect the willingness of future generations to make those same sacrifices. "

Surely, the right to a day in court is not too much to ask from the American people and its Congress.

Legislative Agenda

1. De Novo Judicial Review, no satisfactory alternative.

2. Attorneys permitted at all stages of adjudication with reasonably capped fees.

3. A source of independent appeal external to VA prior to veterans requiring access to the courts. Ombudsmen type personnel.

4. Repeal U.S.C. 3402 (2). Thereafter, grant NVSO's an independent right to the space they now occupy.

5. BVA should be entirely independent of the VA Administrator and the precedent opinions of the General Counsel.

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Oral statement of
Philip E. Cushman
National President
Veterans Due Process, Inc.
Before the
Committee on Veterans' Affairs
UNITED STATES SENATE
April 28, 1988

My name is Philip Cushman, and I am the National President of **Veterans Due Process**, Inc., based in Portland, Oregon. Mr. Cooper, National Legislative Director, will present an overview of our written testimony, but I would just like to say that we believe that the Veterans Administration (VA)/"IRON TRIANGLE" system of "justice" is broke. Existing Congressional hearings records, the NARS trial record, and numerous other records, clearly establish that the VA can, easily, wrongfully and/or illegally deny needed medical care or disability compensation for war injuries to any veteran, in order to satisfy agency budgetary constraints, or for any other reason. VDP supports S.11.

The single major point which I want to make today, concerns the fact that the American people are being **DECEIVED** by our government, by NOT being **WARNED** about the fact that if their loved ones are injured as a direct result of performance of military duties, while honorably and patriotically defending America and her Constitution, that those loved ones will, for the rest of their lives, have **NO** legal **ENFORCEABLE RIGHT**** to necessary VA medical care or disability compensation, etc., concerning such war injuries.

Our fellow Americans now trustingly **ASSUME** without question, that their war injured loved ones will enjoy the basic legal rights and freedoms which they were injured defending for every other citizen, including meaningful access to the "**AMERICAN SYSTEM OF JUSTICE**", but they are being deceived.

It appears very likely that the Senate will pass S.11, as it has 4 times during the past 10 years, once again attempting to make the VA accountable to the courts, but just as likely appears the certainty that Congressman G.V. Montgomery will ignore the Senate action, and kill the similiar House bill.

As an ex-Marine injured in Vietnam, I tell you that I believe that it is a **DIRTY TRICK** to send patriotic young Americans off to war to defend the Constitution, and **without warning**, strip us of its guaranteed legal protections, if we are injured defending it. Sadly, it appears as though this betrayal will continue, as will VA abuses of power.

If VA Judicial Review again dies, VDP believes that Congress must take immediate emergency action, to protect future veterans, by stopping this deception, and ensuring that every American who enters the military (and their loved ones), are warned about this **CLEAR AND SERIOUS DANGER**. The present policy of "no warning" is unconscionable, and, incredibly, is based on trust. **PLEASE STOP THIS PERFIDIOUS BETRAYAL NOW!**

END

** A law passed during 1862, 38 USC 3404, 3405, places a $10.00 limit on attorney fees for total services rendered by any attorney representing a veteran concerning a claim against the Veterans Administration.

A law passed during 1933 (Economy Act), 38 USC 211a, closes every court of law in America to any veteran wishing to challenge a VA decision concerning his/her claim, to a fair and **IMPARTIAL** court of law.

STATEMENT OF DONALD L. IVERS
GENERAL COUNSEL
VETERANS ADMINISTRATION
BEFORE THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
SEPTEMBER 8, 1988

Mr. Chairman and Members of the Committee:

I am pleased to be here today to present the views of the Veterans Administration (VA) on four bills: H.R. 639, H.R. 5039, S. 11, and S. 2292.

The VA is opposed to enactment of these measures. The Agency has historically opposed legislation that would involve the courts in individual benefit determinations or otherwise complicate and lengthen the nonadversarial administrative claims process. Moreover, we are not convinced that the Board of Veterans Appeals (BVA) is in need of reform or restructuring. My testimony today will focus on our major concerns in maintaining an efficient, responsive, and equitable process for all veterans.

Summarizing the bills, H.R. 639, 100th Congress, the "Veterans' Administration Adjudication Procedure and Judicial Review Act," would provide for judicial review of individual benefit determinations in the United States district courts. Questions of fact and law would be subject to the "arbitrary-and-capricious" standard. The statutory attorney-fee limitation would be amended to allow payment of up to $500, or 25 percent of past-due benefits under a contingent-fee agreement, for representation before the Agency. Additional fees would be allowable for extraordinary circumstances. An attorney would be entitled to $750, or 25 percent of past-due benefits under a contingent-fee agreement, for representation in the courts. If the Administrator's actions are found not to be substantially justified or if special circumstances warrant, a court could award a fee to a claimant to be paid by the Government.

H.R. 5039, 100th Congress, the "Veterans' Reassurance Act of 1988," introduced at the request of the American Legion, would authorize judicial review of VA orders in the United States circuit courts of appeals. An "order" would encompass any rule, regulation or guideline, but exclude claim decisions. An attorney would be allowed a fee of up to

3.

$500, or 25 percent of past-due benefits under a contingent-fee agreement for representation before the VA, and $750, or 25 percent of past-due benefits under a contingent-fee agreement, for representation in court. The measure would also establish a new United States Board of Veterans' Appeals, with authority to set aside any rule, regulation, policy, or interpretation of law that it finds to be unconstitutional or contrary to law.

S. 11, 100th Congress, the "Veterans' Administration Adjudication Procedure and Judicial Review Act," would authorize judicial review in the U.S. courts of appeals of final BVA decisions and challenges to rules and regulations adopted by the Administrator. Questions of law would be reviewable and the courts could set aside findings of fact "so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside." For representation before the Agency, the bill would allow attorney fees of $500 or 25 percent of past-due benefits if there is a contingent-fee agreement. Where a case is resolved favorably to a litigant by a court, S. 11 would permit payment of 25 percent of past-due benefits and, where the litigant does not prevail, attorney fees up to

$750 would be allowable. Payment of fees and costs would also be authorized under the Equal Access to Justice Act, 28 U.S.C. § 2412(d). Finally, the bill would repeal the provision of law making the BVA Chairman directly responsible to the Administrator, prohibit the awarding of bonuses to Board members, and limit the tenure of the Board Chairman and members.

S. 2292, 100th Congress, the "Veterans' Judicial Review Act," would authorize judicial review of VA rulemaking in the U.S. courts of appeals under chapter seven of the Administrative Procedure Act, as well as judicial review of final BVA decisions on the validity of VA regulations. In the latter case, the courts could set aside regulations found to be contrary to constitutional right, power, privilege or immunity, or in excess of statutory jurisdiction, authority or limitations, short of statutory right, or resting upon a policy judgment, reasoning or factual premise so unacceptable as to render the regulation arbitrary. Attorney fees up to $500, or 25 percent of past-due benefits under a contingent-fee agreement, could be approved by the Agency, and a court could approve reasonable fees if the claimant prevails or up to $750 if the claimant is unsuccessful. Additional fees and costs would be authorized under the Equal Access to Justice Act. The bill would also repeal the statute making the Chairman of the BVA directly responsible to the Administrator and the statute making VA regulations, instructions of the Administrator, and General Counsel opinions binding upon the Board. The Board would be authorized to review the validity of Agency regulations, policies and interpretations, other than the Schedule for Rating Disabilities. Finally, S. 2292 would set fixed terms of service for the Chairman and other Board members, and prohibit the awarding of bonuses to Board members.

Our principal concern is with judicial review of VA benefit decisions in the Federal courts. In the seminal case of Johnson v. Robison, 415 U.S. 361 (1974), the Court noted two important functions of 38 U.S.C. § 211(a) in precluding judicial review: To ensure that veterans' claims will not burden the courts and the VA with expensive and time-consuming litigation, and to ensure that technical and complex determinations rendered by the Agency will be adequately made and uniformly applied. 415 U.S. at 370. The Court acknowledged, however, that section 211(a) does not preclude judicial review of a constitutional challenge to a statute administered by the Agency. 415 U.S. at 367.

The courts since Robison have not definitively determined the breadth of the exception to section 211(a). For example, the Fourth, Sixth, Eighth, and Ninth Circuits have held that section 211(a) does not preclude court challenges to VA regulations as being inconsistent with the authorizing statutes. See Evergreen State College v. Cleland, 621 F.2d 1002 (9th Cir. 1980); Univ. of Maryland v. Cleland, 621 F.2d 98 (4th Cir. 1980); Merged Area X (Education) v. Cleland, 604 F.2d 1075 (8th Cir. 1979); Wayne State Univ. v. Cleland, 590 F.2d 627 (6th Cir. 1978). By contrast, the Fifth and Seventh Circuits have limited court access to direct constitutional challenges to VA statutes, regulations, or procedures. See Marozsan v. United States of America, No. 86-1954 (7th Cir. July 25, 1988); Anderson v. Veterans Administration, 559 F.2d 935 (5th Cir. 1977). Other circuits, such as the District of Columbia Circuit, have not had occasion to reach a decision on the scope of the exception. See McKelvey v. Walters, 792 F.2d 194 (D.C. Cir. 1986).

7.

From a policy perspective, the VA would not object to an amendment of section 211(a) to authorize bona fide challenges to VA regulations. Such an amendment would extend the bounds of review, faithfully maintain the balance of power between the Judicial and Executive branches, and preserve the important purposes of section 211(a), i.e., utilizing the superior expertise of the Agency and avoiding burdensome and expensive litigation.

Nonetheless, there should also be a reaffirmation that Agency factfinding in individual benefit decisions and the application of law to the facts in claims are immune from court scrutiny. Judicial review of such matters would be duplicative, wasteful and inefficient.

The VA affords claimants de novo factual review by collegial bodies at both the initial and appellate stages, employing adjudicators with specialized knowledge of veterans law and medical expertise. Informal, nonadversarial hearings are provided upon request, and reasonable doubt in matters of evidence is resolved in the claimants' favor. Moreover, the Agency has instituted stringent quality control procedures to ensure the accuracy of its decisions.

Judicial review in the Federal courts would produce inconsistency and delay. It has been observed "the courts are not well equipped to determine such factual issues as whether or not an injury is service-connected or to determine other medical or technical questions, which are of a type the Veterans Administration confronts all of the time *uniformly*." Prepared Statement of Honorable Morris S. Arnold and Honorable Stephen G. Breyer, Administrative Office of the United States Courts, Hearing on S. 11 and S. 2292 before the Senate Committee on Veterans' Affairs, p. 17 (April 28, 1988). The courts, including the courts of appeals, tend to differ on procedural rules, evidentiary requirements, and interpretation of substantive law. Thus, judicial review in the Federal courts may be expected to yield inconsistent case law and geographically-based decisions. Predictability and consistency are essential to claimants' perception of fairness. A system that produces surprise outcomes or in which results are dependent upon where the parties reside will appear to be unjust and arbitrary.

9.

The increase in the caseload of the Federal courts brought about by enactment of judicial review legislation would also threaten the quality and timeliness of decisions. Likening VA claims to Social Security cases, the Judicial Conference has warned:

> Because of the large numbers of criminal cases and others that have priority, the Social Security cases move very slowly through the court system, and it is not unusual to find an appeal in the court of appeals involving a claim filed five or more years prior to submission of the appeal to the three-judge panel. This delay is extremely undesirable. However, because of the heavy caseload of the courts, such delay is inevitable.

Prepared Statement of Honorable Morris S. Arnold and Honorable Stephen G. Breyer, Administrative Office of the United States Courts, Hearing on S. 11 and S. 2292 before the Senate Committee on Veterans' Affairs, p. 16 (April 28, 1988).

With regard to attorney fees, our primary concerns are that increased participation of compensated counsel at the Agency level may have a deleterious effect on the nonadversarial administrative claims system. Furthermore, the Agency should not be interjected into the essentially private relationship between clients and attorneys through monitoring, collecting, or awarding fees for professional services.

The presence of attorneys may result in an adversarial process to the detriment of all claimants. It has been observed:

> Lawyers as a class are imbued with a will to win. The formal adversary system allows, if not encourages, a win-at-all-costs attitude, all or none, pitting lawyers as paladins in combat. Unfortunately, open combat is not always in the best interest of clients or of the justice system.

Arnold I. Burns, Deputy Attorney General, U.S. Department of Justice, *A View from the Department of Justice: A Colloquium on Improving Dispute Resolution: Options for the Federal Government*, 1 Admin. L. J. 441, 447 (1987).

With increased attorney participation, those who retain counsel will obviously bear greater expense, and those who do not will feel the effects of the burdens and delays brought about by attorneys. Moreover, it is conceivable that such representation would eventually become the norm, regardless of whether a claimant actually needs a lawyer. The United States Supreme Court has observed:

> It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation. It is only a small step beyond that to the situation in which the claimant who has a factually simple and obviously deserving claim may nonetheless feel impelled to

> retain an attorney simply because so many
> other claimants retain attorneys.

Walters v. National Association of Radiation Survivors, 105 S. Ct. 3180, 3192 (1985).

Finally, we believe the Board of Veterans Appeals is operating well and that its members enjoy sufficient autonomy to assure independent and impartial review of appealed claims. Over the years, the Board has maintained a balance of quality, timeliness and productivity in rendering its decisions. We are unaware of any legitimate concerns that its independence has in any way been compromised by its institutional relationship with the rest of the Agency. In particular, we do not believe the proposed limitations on terms of office for Board members would in any way enhance their independence. Any who may seek reappointment may instead feel pressure to conform their decisionmaking to the expectations of those whose authority it is to have them reappointed.

The VA is strongly opposed to legislative proposals that would authorize the BVA, or any other element of the Agency, to invalidate its regulations and other precedential interpretations of VA law. It is essential that the Agency employ a coherent and consistent interpretation of the law. In the event the Board is permitted to second-guess or disregard VA regulations and their interpretation, the law applied to claims may vary depending upon the stage of adjudication; i.e., rating boards may apply different standards than the BVA. Moreover, the interpretations of law may differ significantly even among the numerous sections of the Board. In any case, reformulation of section 211(a), as noted earlier, would ensure veterans a day in court to challenge VA regulations, and thus provide for an independent review without the divisiveness or chaos that would be engendered by empowering one element of the Agency to abrogate VA regulations and other governing interpretations of law.

Board of Veterans Apppeals
Overall Representation
FY 1988 (3 QTRS) Travel Board Decisions

Representation	Total Decisions		Allowed		Remanded		Denied		Other	
	No.	%	No.	%	No.	%	No.	%	No.	%
American Legion	67	12.5%	16	23.9%	12	17.9%	39	58.2%	0	0.0%
AMVETS	7	1.3%	2	28.6%	0	0.0%	5	71.4%	0	0.0%
American Red Cross	6	1.1%	0	0.0%	1	16.7%	5	83.3%	0	0.0%
Disabled American Veterans	274	51.3%	80	29.2%	68	24.8%	126	46.0%	0	0.0%
Jewish War Veterans	1	0.2%	0	0.0%	0	0.0%	1	100.0%	0	0.0%
Military Order of Purple Heart	23	4.3%	7	30.4%	4	17.4%	12	52.2%	0	0.0%
Paralyzed Veterans of America	35	6.6%	13	37.1%	8	22.9%	14	40.0%	0	0.0%
Veterans of Foreign Wars	40	7.5%	8	20.0%	7	17.5%	24	60.0%	1	2.5%
State Service Organizations	31	5.8%	7	22.6%	14	45.2%	10	32.3%	0	0.0%
Attorneys	20	3.7%	5	25.0%	5	25.0%	10	50.0%	0	0.0%
Agents	2	0.4%	1	50.0%	0	0.0%	1	50.0%	0	0.0%
Vietnam Veterans of America	6	1.1%	1	16.7%	2	33.3%	3	50.0%	0	0.0%
Other Representation	10	1.9%	3	30.0%	2	20.0%	5	50.0%	0	0.0%
No Representation	12	2.2%	2	16.7%	5	41.7%	5	41.7%	0	0.0%
TOTALS	534	100.0%	145	27.2%	128	24.0%	260	48.7%	1	0.2%

Board of Veterans Apppeals
Overall Representation
FY 1987 Travel Board Decisions

Representation	Total Decisions No.	Total Decisions %	Allowed No.	Allowed %	Remanded No.	Remanded %	Denied No.	Denied %	Other No.	Other %
American Legion	79	11.9%	27	34.2%	8	10.1%	44	55.7%	0	0.0%
AMVETS	33	5.0%	11	33.3%	9	27.3%	13	39.4%	0	0.0%
American Red Cross	5	0.8%	2	40.0%	1	20.0%	2	40.0%	0	0.0%
Disabled American Veterans	307	46.3%	97	31.6%	74	24.1%	135	44.0%	1	0.3%
Jewish War Veterans	1	0.2%	0	0.0%	1	100.0%	0	0.0%	0	0.0%
Military Order of Purple Heart	17	2.6%	6	35.3%	5	29.4%	6	35.3%	0	0.0%
Paralyzed Veterans of America	48	7.2%	19	39.6%	14	29.2%	15	31.3%	0	0.0%
Veterans of Foreign Wars	69	10.4%	19	27.5%	15	21.7%	35	50.7%	0	0.0%
State Service Organizations	56	8.4%	19	33.9%	9	16.1%	28	50.0%	0	0.0%
Attorneys	32	4.8%	12	37.5%	6	18.8%	14	43.8%	0	0.0%
Agents	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Vietnam Veterans of America	2	0.3%	0	0.0%	1	50.0%	1	50.0%	0	0.0%
Other Representation	6	0.9%	2	33.3%	0	0.0%	4	66.7%	0	0.0%
No Representation	8	1.2%	5	62.5%	0	0.0%	3	37.5%	0	0.0%
TOTALS	663	100.0%	219	33.0%	143	21.6%	300	45.2%	1	0.2%

Board of Veterans Apppeals
Overall Representation
FY 1986 Travel Board Decisions

Representation	Total Decisions No.	Total Decisions %	Allowed No.	Allowed %	Remanded No.	Remanded %	Denied No.	Denied %	Other No.	Other %
American Legion	96	13.9%	33	34.4%	17	17.7%	46	47.9%	0	0.0%
AMVETS	20	2.9%	5	25.0%	4	20.0%	11	55.0%	0	0.0%
American Red Cross	13	1.9%	5	38.5%	1	7.7%	7	53.8%	0	0.0%
Disabled American Veterans	336	48.5%	110	32.7%	59	17.6%	167	49.7%	0	0.0%
Jewish War Veterans	5	0.7%	1	20.0%	2	40.0%	2	40.0%	0	0.0%
Military Order of Purple Heart	9	1.3%	4	44.4%	1	11.1%	4	44.4%	0	0.0%
Paralyzed Veterans of America	32	4.6%	12	37.5%	11	34.4%	9	28.1%	0	0.0%
Veterans of Foreign Wars	67	9.7%	11	16.4%	8	11.9%	48	71.6%	0	0.0%
State Service Organizations	59	8.5%	12	20.3%	14	23.7%	33	55.9%	0	0.0%
Attorneys (and Agents)	3	0.4%	1	33.3%	0	0.0%	1	33.3%	1	33.3%
Agents										
Vietnam Veterans of America										
Other Representation	38	5.5%	8	21.1%	13	34.2%	17	44.7%	0	0.0%
No Representation	15	2.2%	3	20.0%	1	6.7%	11	73.3%	0	0.0%
TOTALS	693	100.0%	205	29.6%	131	18.9%	356	51.4%	1	0.1%

STATEMENT OF MARSHALL J. BREGER
CHAIRMAN
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
To The
HOUSE COMMITTEE ON VETERANS' AFFAIRS
On
H.R. 639
The Veterans' Administration Adjudication Procedure
and Judicial Review Act
and
H.R. 5039
The Veterans' Reassurance Act of 1988

September 8, 1988

APPENDICES NOT INCLUDED WITH
THIS COPY

Mr. Chairman and Members of the Committee, I am pleased to respond to your request for the views of the Administrative Conference on H.R. 639, the "Veterans' Administration Adjudication Procedure and Judicial Review Act," and H.R. 5039, the "Veterans' Reassurance Act of 1988." In considering those views, it is essential that the Committee understand the role of the Conference and the manner in which it reaches positions on issues.

The Conference is an independent Federal agency whose statutory mission is to perform studies and recommend improvements in the administrative procedures used by Federal departments and agencies.[1] We try to assist Congress, the executive branch, and the independent agencies in developing procedures that provide greater fairness and expedition for participants in the administrative process, more effective attainment of agencies' goals, and lower costs to the taxpayers.

We are authorized to have 101 members -- 61 from the departments and agencies in the Federal Government and 40 from the private sector. All of the individuals are chosen because of their experience with issues of the administrative process. I serve as Chairman of the Conference, and head a small full-time staff.

The Conference takes formal positions only through the vote of our total membership at our plenary sessions. The Conference operates, however, through a committee system. Each member serves on one or more committees. The committees ordinarily act on the basis of reports and proposed recommendations prepared by consultants, ordinarily members of the academic community, who are engaged by the Office of the Chairman. A committee will usually meet several times in the course of considering a report and preparing a recommendation. We also seek comments from affected agencies and interested members of the public. The proposal will be published in the Federal Register in order to obtain an even broader range of views. When the committee reports out a recommendation, it is referred to the Council of the Conference, our board of directors, for placement on the agenda of the next plenary session. When a proposed recommendation reaches the Assembly of the Conference at the plenary session, it may be amended, approved, defeated or tabled. If approved, it becomes an official position of the Conference. It is published in the Federal Register and the Office of the Chairman of the Conference sees that it is brought to the attention of those to whom it is relevant. With that background in mind, let me turn to those aspects of the subject bills the Conference has examined.

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[1] See 5 U.S.C. § 574.

Among other things, H.R. 639 would make certain modifications in the adjudication of claims for benefits under laws administered by the Veterans Administration, bring the VA's rulemaking activity under the normal procedural requirements of the Administrative Procedure Act, provide for judicial review of final benefit claims decisions of the Administrator, and authorize the payment of reasonable attorneys' fees for those representing claimants seeking benefits. H.R. 5039 would likewise bring the VA's rulemaking activity under the requirements of the APA. In addition, it would permit claimants to challenge certain VA regulations, policy statements, or interpretations before a newly constituted and more independent Board of Veterans' Appeals, which would have 65 members appointed by the President with the advice and consent of the Senate. The Board could set aside those VA pronouncements it found contrary to the Constitution or federal law. The Board's decisions in this regard would be subject to judicial review in the Courts of Appeal. H.R. 5039 would also allow the Board of Veterans' Appeals to award attorneys fees in certain circumstances. Finally, H.R. 5039 would establish a federal "representative-client" privilege for those non-lawyers who represent veteran before the VA and exempt these representatives from malpractice responsibility in most cases in which they assist veterans in the processing of claims.

The Conference has looked, at least generally, at four of these matters -- namely, applying the APA to VA rulemaking proceedings, review of rules by independent tribunals, the role of non-lawyer representatives, and authorizing judicial review of VA decisions. So I can offer some observations on these. It has not considered the other matters which the bills address and I offer no views on them.

1. Rulemaking

In section 553 of the Administrative Procedure Act (APA), Congress provided that the public ordinarily have an opportunity to participate in an agency's rulemaking process. This aspect of the APA is intended to assure that Federal agencies have the benefit of information and opinion that can be supplied by persons whom regulations will affect. The procedures to assure this opportunity are not required, however, in certain narrow circumstances, such as where government benefits programs are involved. This exception was established by the original APA in 1946 because benefits programs were deemed to be among the "proprietary" functions of the Federal government.[2] But rules governing benefits programs can nonetheless bear heavily upon non-governmental interests. As a consequence, the Conference, in one of its earliest recommendations, urged the Congress to remove the exemption from notice and comment rulemaking requirements for benefits programs, as well as other aspects of the so-called "proprietary exemption" (i.e., property, loans, grants, benefits and contracts).[3] This has not occurred. But both Congress and most agencies have, either through legislation or administrative practice, effectively eliminated the exemption in certain circumstances. The Social Security benefits program is a prime example.

In the Conference's view, elimination of such exemptions strengthens procedures that make for the type of fair, informed exercise of rulemaking authority that is now prevalent throughout the governmental process as a whole. Because both H.R. 639 and H.R. 5039 would specifically adopt the Conference's recommendation as it pertains to rulemaking affecting veterans benefits claims, the Conference strongly supports their enactment in this regard.

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[2] See Attorney General's Manual on the Administrative Procedure Act 27 (1947).

[3] Recommendation 69-8: Elimination of Certain Exemptions from the APA Rulemaking Requirements, 1 CFR 305.69-8 (1988).

2. Review of Rules By The Board of Veterans' Appeals

H.R. 5039 would reconstitute the Board of Veterans' Appeals, with Presidential appointees as the 65 members. The Conference has not studied the role of the Board of Veterans' Appeals and has no opinion as to whether a reconstitution of the Board and a basic redirection of its role is necessary or desirable. But we have studied the more general problem of review of agency regulations by a separate and independent administrative tribunal. I am happy to share our findings on that issue with you.

In 1986, the Conference examined what we described as a "split enforcement model," i.e., a situation in which one agency is responsible for the enactment and enforcement of regulations or standards and a separate, independent agency is responsible for adjudicating those enforcement actions. We examined the model in light of provisions of the Occupational Safety and Health Act, which charged the Department of Labor (through the Occupational Safety and Health Administration, or OSHA) with enforcement responsibility before the Occupational Safety and Health Review Commission (OSHRC), and the Federal Mine Safety and Health Amendments Act of 1977, which also gave the Department of Labor enforcement authority (this time, through the Mine Safety and Health Administration, or MSHA) before the independent Federal Mine Safety and Health Review Commission (FMSHRC). (See Recommendation 86-4: The Split-Enforcement Model for Agency Adjudication, 1 CFR 305.86-4.)

Our consultant, Professor Robert Johnson of George Mason University Law School, acknowledged the appeal of such a model. It can provide greater public confidence in the overall program, enhance the prospects for due process, or, at a minimum, to use Professor

Johnson's words, provide "simply a quick solution to a troubling political problem."[4] Neither Professor Johnson nor the Conference, however, was prepared to say that such a split enforcement model was superior to conventional administrative separation of functions within the same agency. But both Professor Johnson and the Conference were agreed that, in any statutory bifurcation of rulemaking and adjudicatory responsibility, the adjudicatory body should accept the policy agency's interpretation of a standard unless it could be shown that the rulemaking agency's interpretation was arbitrary, capricious or otherwise not in accordance with law. That is because the rulemaker is generally charged by Congress with overall policy responsibility.

There are plainly several key differences between the OSHA or MSHA model, on the one hand, and the proposal to re-establish the Board of Veterans' Appeals within the Veterans Administration and give it new decisional powers, on the other. The VA, after all, is a claims agency not an enforcement agency. Clearly the experience gleaned from the occupational health and safety area cannot simply be extrapolated to the very different world of veterans' claims. But, like the Department of Labor, the VA has overall program responsibility for the handling of veterans' claims and it fulfills that responsibility, at least in part, through the adoption of regulations, policy statements and interpretations designed to implement its responsibility. Congress presumably holds the Administrator responsible for the VA's actions. The assignment of responsibility to the Board of Veterans' Appeals to determine the legality of the Administrator's pronouncements, even under the narrow standard contained in section 204 of H.R. 5039, will plainly give the new board a broader role in the articulation of VA policy. Whether such new role is necessary or desirable is a question for the Congress to consider, and ultimately answer. If Congress decides to confer this new role on the board, we believe that the conferral of power under the standard contained in H.R. 5039 is preferable to the approach of S. 2292, for example, which would give the new board the power to overturn VA regulations but not articulate standards for doing so.

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[4] Johnson, The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences, Report to the Administrative Conference of the United States (August 30, 1986), in 1986 ACUS Recommendations and Reports 533.

3. Role of Claimant Representatives

Current law authorizes the Veterans Administration to recognize representatives of various veterans and other service organizations to assist veterans in the processing of claims before the VA. H.R. 5039 would establish a federal "representative-client" privilege for communications between claimants and their representatives akin to the attorney-client privilege. It would also exempt representatives of service organizations from malpractice responsibility unless a claimant could demonstrate intentional misconduct on the part of a representative.

The Conference has not studied the pros and cons of these new provisions and thus offers no view on them. But we have reviewed the more general issue of how to enhance the provision of assistance to claimants in mass justice programs such as veterans' claims. Based on that general review, we urge the Congress to examine the provisions of H.R. 5039 in light of two principal goals -- namely facilitating increased assistance by nonlawyers and maximizing the potential for free choice of representatives.[5]

4. Judicial Review

The Conference has considered the question of whether judicial review ought to be available for VA benefit determinations. In contrast to our views on the applicability of APA rulemaking procedures to claims issues, the question of judicial review is one on which the Conference has not taken a formal position. Rather, after full debate, the Conference expressly decided not to take a position. But I believe that our experience studying the issue may nevertheless be of some help to the committee in its deliberations.

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[5] See Recommendation 86-1: Nonlawyer Assistance and Representation, 1 C.F.R. 305.86-1.

In 1978, our Committee on Judicial Review recommended that the law precluding judicial review be changed to allow judicial review at the instance of any person adversely affected or aggrieved. That recommendation was vigorously debated by the full membership at our December, 1978 plenary session, but was eventually tabled. For your information, I have appended a copy of our Judicial Review Committee's 1978 recommendation and the transcript of the December 1978 plenary session deliberations. They reflect, I believe, all of the pros and cons on the issue by some of the nation's foremost legal scholars, judges and practitioners. That debate demonstrates that the issue does not lend itself to easy resolution. Let me briefly outline what I believe to be the key areas of debate.

Congress has stated explicitly that benefits decisions of the Veterans Administration "shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."[6] While insulation of VA decisions from judicial review is longstanding, it does run counter to the general principle expressed in the Administrative Procedure Act and in judicial decisions that a person adversely affected or aggrieved by an administrative action is entitled to judicial review.[7] It was for that reason (and because proposals for judicial review were then pending in Congress) that the Administrative Conference undertook a study of the problem in the latter half of 1978.

We commissioned Professor Frederick Davis, then of the University of Missouri School of Law, to do the study; Professor Davis is a recognized expert who had previously done some work in the area. Professor Davis' report, *Judicial Review of Benefits Decisions of the Veterans Administration*, a copy of which I am including with this statement, was referred to the Conference's Committee on Judicial Review. The Committee met twice in October, 1978, to consider the report and proposed recommendation, obtained the views of the Veterans Administration, the Department of Justice, and the principal veterans' organizations, and approved the recommendation which called for legislative action to permit judicial review of Veterans Administration decisions. The recommendation emphasized, however, that it was not calling for any change in the VA's informal decisionmaking procedures. Furthermore, the recommendation urged what was believed to be a rather narrow form of court review -- i.e., whether, on the basis of the administrative record compiled by the VA, the court could determine that the VA's action was unlawful, arbitrary or capricious.

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[6] See 38 U.S.C. § 211(a).

[7] See 5 U.S.C. § 702; *Lindahl* v. *Office of Personnel Management*, 470 U.S. 777, 778 (1985), citing *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967).

The Judicial Review Committee proposal was presented to the Assembly of the Conference at its Eighteenth Plenary Session in December, 1978. After a vigorous debate, the Assembly decided to table -- in essence, to take no action on -- the proposal.

Briefly, the position of Professor Davis and the Judicial Review Committee was that the principle of unreviewable administrative action -- at least with respect to cases of this kind which do not involve delegations of broad administrative discretion, but rather the application of specific statutory standards to individual situations -- is wrong and contrary to general administrative practice. Furthermore, while the proponents admitted that they could not show that the VA's administrative processes worked badly or unfairly, there was anecdotal evidence of occasional arbitrariness. It was also argued that, without judicial review as a means of inquiring into the VA's practices, it would be hard to say how well the system as a whole works. Finally, it was urged that under the Committee's proposed recommendation, which called for a fairly narrow standard of judicial review, it was unlikely that the additional burden on the courts could be significant.

The opponents of the proposal, notably Professor Kenneth Culp Davis, the late Judge Harold Leventhal, and former Conference Chairman and now Justice Antonin Scalia, argued that the nonreviewability of VA determinations is not unique and that there was insufficient showing that the present system was not working well. They feared that there would be an additional burden on the courts and doubted that occasional review by federal judges unfamiliar with VA's statutes and regulations would really improve the results in VA cases.

Finally, the argument was made that even though the recommendation did not call for more formality in VA procedures, the prospect of judicial review would tend to have that effect.

In the end, the Assembly voted to table the proposal. This action essentially reflected a judgment that the case for the proposed recommendation was not proven. While a decision to table does not necessarily foreclose future Conference action, the Conference staff and members of the Judicial Review Committee believed that there was nothing to be gained by pursuing the subject further at that time. No action has been taken since 1978.

The fact that the Conference was sufficiently divided on the issue of judicial review to table the recommendation and that the matter remains a contentious one a decade later suggests that there is merit on both sides. Perhaps that also suggests that the Congress might wish to consider some middle ground. In the course of the Conference's 1978 debate, a number of proposed "middle positions" were suggested. One was to permit judicial review, but only as to constitutional questions or only as to questions of law; that is to say, review of the reasonableness of particular factual determinations would be excluded. Another option was to provide review, but in a specialized court, a Court of Veterans Appeals. Still another possible approach, although it did not figure in the debate, is suggested by an earlier Conference recommendation, and that is for improvements in the quality control procedures within the Veterans Administration.[8]

Whether any of these options is to be preferred to a reversal in the law of judicial review of VA decision will depend on Congress' perceptions of what problems exist with the current system. Indeed, the bills before you reflect different perspectives regarding what is wrong with the existing system and how to correct it. If the problem is inconsistency, bias or other weaknesses in the VA's decisional process, judicial review under a narrow standard of review could provide some relief. But improved managerial controls, a specialized reviewing body, or, perhaps, an agency ombudsman, might be an equally, if not more constructive, solution. If Congress believes that the problem lies essentially in the VA's governing regulations, it could adopt the approach set out in both bills to require notice and comment rulemaking for such regulations, and allow aggrieved parties to challenge the VA's rules in court in the same way that affected parties may now attack the promulgation of regulations, or the denial of a petition for repeal or amendment of existing regulations, by other agencies.

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[8] See Recommendation 73-3: Quality Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation, 1 C.F.R. 305.73-3 (1988).

Congress should also consider the forum for any judicial review it might provide. The Conference studied this issue on a government-wide basis in 1975.[9] Briefly summarized, the Conference found that direct review of rules by the Court of Appeals is ordinarily appropriate whenever a District Court decision respecting the validity of a regulation will likely be appealed in any event or the public interest requires prompt, authoritative determination of the rule's validity. If Congress decides to require notice and comment rulemaking procedure for VA rules, with subsequent judicial review, the VA's rules would appear suitable to direct Court of Appeals review as proposed in H.R. 5039. Agency determination based on trial-type hearings and rules required by statute to be based on a hearing should likewise be made directly reviewable in the Courts of Appeal. District Court review would be appropriate only if the action to be reviewed is of a type that rarely involves issues of law or broad social or economic policy and District Court review would significantly reduce the workload of the appellate courts. If Congress believes that the review of veterans' claims will ordinarily turn on factual rather than policy issues, judicial review in a district court as proposed in H.R. 639 would be reasonable.

Conclusion

The debate in 1978 revealed that the membership of the Conference did not have a strong sense that they knew what was wrong, or, indeed, that they knew that anything was wrong, with the VA's administration of benefits claims. Consequently, they were reluctant to prescribe a solution. The Committee, therefore, may wish to focus its inquiry on the specific perceived weaknesses in, or grounds for dissatisfaction with, the Veterans Administration's own processes. Your conclusions are likely to influence your judgement as to whether there should be judicial review and what form that review should take or whether some other remedy, such as a reconstitution of the Board of Veterans' Appeals, will be equally or more efficacious.

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[9] Recommendation 75-3: The Choice of Forum for Judicial Review of Administrative Act, 1 CFR 305.75-3 (1988).

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Deputy Assistant Attorney General

Washington, D.C. 20530

07 SEP 1988

Honorable G.V. Montgomery
Chairman
Committee on Veterans' Affairs
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The Department of Justice appreciates very much the opportunity to present its views on H.R. 639, H.R. 5039, S. 11 as passed by the Senate, and S. 2292, the various proposals to establish judicial review for veterans' benefits. The Justice Department has been involved in the debate over the question of establishing judicial review for veterans' benefits for several years.

Our concern with insuring the fairness of government benefit programs is tempered by an equivalent concern over the impact of establishing judicial review on the functioning of the federal courts and on the ability of veterans to have their claims fairly and expeditiously resolved if subjected to the judicial process. A careful balancing of these two interests leads us to oppose proposals for judicial review of veterans' benefits decisions. We believe that the interests of veterans are not served by superimposing on the present system the ability to appeal to the greatly overcrowded federal courts, thereby further burdening federal judicial officers. Appeal to the courts is not the only or the simplest way to insure justice. Rather, a carefully designed administrative system can preserve and protect all rights provided by law to veterans.

We will not, in this statement, address at length the fairness of the present administrative system or undertake a point by point analysis of the substantive provisions of the bills now before the Committee. These are subjects better addressed by the Veterans Administration. Instead, we will discuss our general concerns with judicial review as illustrated by certain features of the bills. We also note that in discussion of the issue of judicial review over the years, no sponsor of legislation has alleged that the present system results in widespread injustice, and Congress has rejected this notion on several occasions. See, e.g., S. Rep. No. 178, 96th Cong., 1st Sess., 23-24 (1979); S. Rep. No. 466, 97th Cong., 2d Sess. (1982); 133 Cong, Rec. S223 (daily ed. January 6, 1987) (Senator Cranston) (Board of Veterans Appeals members "make a conscientious effort to carry out their responsibilities in an evenhanded fashion and that, by and large, most claimants before the VA are treated fairly"); 134 Cong. Rec. S4189 (daily ed. April 18, 1988) (Senator Murkowski).

Judicial review of veterans' benefits decisions has always been precluded. Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840). This preclusion was codified in 1933. Act of March 23, 1933, Ch. 3, 9 Stat. 48. Congress has repeatedly reenacted this limitation on judicial review. Indeed, Congress has broadened the original language in response to attempts by the courts to narrow the restriction on judicial review of veterans' benefits decisions. For example, in 1970 Congress broadened the restriction, Pub. L. 91-1166, and reaffirmed the rationale behind it. See H. Rep. No. 1166, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 3723, 3729-31.

This statutory preclusion of judicial review has historically been supported by two policy arguments which continue to be valid. As articulated by the Supreme Court in Johnson v. Robison, 415 U.S. 361, 370 (1974), these policies are: first, to insure that veterans' benefits claims will not burden the courts and the Veterans Administration with expensive and time-consuming litigation, and second, to insure that the technical and complex determinations of Veterans Administration policy connected with veterans' benefits decisions will be adequately and uniformly made. To these reasons might be added the equally critical purpose of preserving the present informal, nonadversarial procedures -- weighted in favor of the claimant -- from becoming excessively formal, more adversarial, and more expensive for both the claimant and the veterans' programs budget.

The first reason offered in support of the restriction on judicial review is, if anything, more compelling now than when Johnson was decided. As the courts become increasingly overloaded, the delivery of justice becomes slower and the quality of the decision-making process declines. Particularly in light of the continuing budget crisis, which has forced the curtailment of many programs, it is difficult to justify the imposition of substantial additional costs on the taxpayer for what may be, at best, a marginal improvement in the quality of decision making for veterans' benefits claims.

The case-load burden has led to assembly-line procedures in the courts for disposing of cases, particularly small, routine government benefit cases such as veterans' claims. The press of business does not allow judges sufficient time for mastery of the record or reflection. Back in 1975, the late Judge Ben C. Duniway of the Ninth Circuit was moved to reflect that federal judges "are no longer able to give to the cases that ought to have careful attention the time and attention which they deserve." Rather than abating, the caseload crisis has worsened since Judge Duniway's comment.

The Veterans Administration has estimated that the Board of Veterans Appeals, the last step in the administrative review process, hears approximately 41,500 appeals a year. Of these, approximately 70% are denied. It would be expected that a substantial number of these denials, perhaps up to 20%, would be appealed to the courts, adding approximately 5800 new cases a year to the burden of the federal courts. An immediate need for additional federal judges -- eleven, according to the estimate of the Judicial Conference -- would be an undoubted corollary to judicial review.

The increase in cases would come at a time when leading judicial authorities are echoing Judge Duniway's comment, decrying the impact of overcrowded dockets on the quality of justice delivered by the courts, and encouraging the development of alternative methods of dispute resolution outside the judicial system. The Veterans Administration already provides an effective mechanism for resolving claims outside the judicial system. Claims for veterans' benefits are resolved, for the most part, outside of the courts in a less formal, nonadversarial process, which keeps down the transaction costs of the benefits decisions. It is our view that this should remain the case.

Veterans' benefits determinations are not the only type of administrative determination not subject to judicial review. In the area of government benefits, for example, judicial review is precluded under the Federal Employees' Compensation Act, 5 U.S.C. § 8128(b). Similarly, there is no judicial review provided for certain types of Medicare determinations. See United States v. Erika, 456 U.S. 201 (1982). Of course, the Constitution does not require judicial review of benefit decisions, DeRodulfa v. United States, 461 F.2d 1240 (D.C. Cir. 1974), and the present administrative scheme does permit judicial review of allegations of unconstitutionality. Likewise, the constitutionality of 38 U.S.C. § 211(a), the statute precluding court jurisdiction over veterans' benefits claims, has been upheld consistently in the courts, and we are unaware of any due process guarantee that mandates a right of judicial review. Rather, our research confirms the continued viability of the principle that Congress, when it creates rights in individuals against the Government, is under no obligation to provide a judicial remedy. It may, instead, establish only an administrative remedy, provided fundamental due process requirements are satisfied.

The Veterans Administration's policy of resolving claims by giving veterans the benefit of the doubt with a minimum of procedural formality (and minimal transaction costs, especially in the form of attorney's fees), is clearly different from the assumptions underlying administrative review of many other benefits programs. Moreover, as Professor Jerry Mashaw, a distinguished scholar of administrative law at Yale Law School has noted, the Veterans Administration has "managed to maintain an acceptable level of satisfaction with its process without significant use of oral hearings, without employing independent [administrative law judges], and without subjecting its judgments to judicial review." Mashaw, Bureaucratic Justice at 142 (1983).

In addition to the added burden that would be placed on the courts, you should be aware that the Department of Justice as well as the Veterans Administration would either require enhanced resources or a readjustment of already overburdened caseloads to handle the increase in litigation resulting from the judicial review of veterans' benefits determinations. In 1978, the Justice Department informed the Senate Veterans' Affairs Committee that 21 lawyers and 24 clerical positions would be required to handle the then-estimated 4,600 cases predicted to arise under the judicial review bill under consideration at that time. S. Rep. No. 178, 96th Cong., 1st Sess. at 13. Based on current salary rates, we estimate the increased cost to the Department of Justice alone could exceed $2,600,000.

Even setting aside the issue of increased cost, we must still consider the critical question: whether the establishment of judicial review of veterans' benefits determinations will somehow enhance the quality of justice accorded to veterans. In our opinion, no improvement will occur. The federal courts do not always unerringly discern the congressional intent behind a legislative scheme, such as veterans' benefits programs. Moreover, additional layers of judicial review can create inconsistencies, the resolution of which requires still further judicial activity and increased costs for the claimant, the government, the judiciary, and, ultimately, the taxpayer. The conception of the courts as the institutional repository of fairness has led to a judicial system which is suffering from severe overload. To save the judicial system -- and to preserve resources for the intended beneficiaries of veterans' benefits programs rather than to expend them on additional costs, delays, and burdens incumbent in a system of review by non-specialist judges across the country -- the veterans' benefits programs should be maintained under a purely administrative system. In addition, we note that additional layers of review will undoubtedly lead to less consistency in the results currently achieved, thereby increasing rather than lessening concerns over consistent, just results.

Our views on H.R. 639, H.R. 5039, S. 11, and S. 2292 reflect these concerns about the impact of judicial review on the Veterans Administration's nonadversarial system. For example, S. 11 and H.R. 639 would authorize judicial review of both regulations and individual claims determinations by the Board of Veterans' Appeals, and would subject those determinations to review that would include not only an inquiry into whether the BVA erred in applying the law, but also an inquiry into the validity of its factfinding. S. 11 and H.R. 639 would authorize the courts, in their "discretion," to require remand of decisions back to the BVA, thereby introducing further delay and uncertainty into this process.

S. 2292, although more limited in scope, similarly subjects to judicial review any claims determinations where the claimant challenges VA "regulations," a term broadly defined to include "statements of general policy and interpretations of general applicability" -- types of agency action currently not subject to judicial review. While we cannot predict how S. 2292 would be interpreted in practice, claimants could argue that it permits judicial review in any case in which it would be illegal for a regulation to be applied to their situation. S. 2292 also purports to authorize a unique (and subjective) standard of review of agency regulations, i.e., regulations could be set aside if "resting upon a policy judgment, reasoning or factual premise so unacceptable as to render the regulation arbitrary."

H.R. 5039, like S. 2292, limits the availability of judicial review to challenges to VA regulations (again very broadly defined). This bill, however, does not provide for review over any matter subject to review by the BVA. While this bill is certainly the least objectionable, we see no reason to subject specialized VA rulemaking to judicial review for the reasons stated above.

We thank you very much for this opportunity to express our views on these issues.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

for
Thomas M. Boyd
Acting Assistant Attorney General

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September 9, 1988

The Honorable G. V. Montgomery, Chairman
Committee on Veterans' Affairs
U.S. House of Representatives
335 Cannon House Office Building
Washington, DC 20515-6335

Dear Mr. Chairman:

We regret that we were unable to testify at your Committee hearing on September 8 on judicial review of VA benefit decisions.

We would like, however, to submit the attached written statement for your review and request that it be made part of the hearing record.

Sincerely,

Denise A Cardman

Denise A. Cardman

DAC:saw
02350

Attachment

AMERICAN BAR ASSOCIATION
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Statement of the

AMERICAN BAR ASSOCIATION

before the

COMMITTEE ON VETERANS' AFFAIRS

of the

U. S. HOUSE OF REPRESENTATIVES

concerning

JUDICIAL REVIEW FOR VETERANS

September 8, 1988

Dear Mr. Chairman and Members of the Committee:

The American Bar Association appreciates the opportunity to present its views on legislation which would permit a veteran to seek judicial review of certain claims and benefits decisions of the Veterans' Administration.

The American Bar Association supports such judicial review and is unequivocally opposed to the present arrangement under which there is absolute and unconditional preclusion of judicial review of allegedly unlawful decisions of the Veterans' Administration.

In 1958 the House of Delegates adopted a resolution expressing its support of legislation which would permit judicial review of decisions of the Veterans' Administration (Appendix A). In 1975 the House of Delegates reaffirmed that position (Appendix B).

It is frequently asserted by those opposed to any change in the present arrangements that permitting even limited review of VA claims and benefits decisions will be unduly costly to both the veterans and the government, that it will result in a significant increase in the caseloads of our federal district courts, that it will destroy flexibility within the VA claims process, and that it will produce inconsistent results, as some federal judges will read the law differently from other federal judges.

We respectfully disagree. The vast majority of veterans will continue to use the services of the veteran organization's claims representatives simply because the amounts involved in most of such claims are not large enough to justify the cost of an attorney. Unlike the social security disability benefits claims, most of the claims processed by the VA involve requests for upgrading of disability ratings. Such adjudications are relatively straightforward and do not, except in very rare cases, call into play a need for legal expertise. It would be the exceptionally rare case--one in which the VA makes a disqualification decision in defiance of a statutory or constitutional command, for example--which would make its way into court. Moreover, the review standards in S. 11 are quite limited (for example, power is not given to the court to reject a VA decision on the ground that it is not supported by substantial evidence in the light of the whole record) so that the burden of showing illegality is so high that very few veterans will be able to make submissible cases. Thus, there would be no increase in costs for the claimant except in that rare case in which the claimant actually needs the services of an attorney. Because the number of cases which would end up being tried is so small, there would be no significant increase in the cost to the government, and no significant increase in the caseloads of our district courts.

The argument that judicial review would "freeze" the VA decisional process into precedential categories resulting from judicial decisions is an old one without any substance at all. The argument is that if there is a judicial precedent arguably forbidding the VA from providing benefits in a case appearing meritorious to the VA, the VA could not exercise its discretionary power to confer the benefit. The fallacy of the argument, of course, is that there would be no one to challenge the decision of the VA in such a case. In any event, this whole matter is well taken care of by §105(3) which makes it clear that the Board's authority to reopen a claim and change a former decision is not affected by a contrary judicial decision.

The fear of inconsistent decisions in the different federal districts is another horror which has little substance. True it is that such results may occur, but, as in all other cases involving appeals from decisions of administrative agencies, there are procedures for harmonizing such inconsistencies through the Circuit Courts of Appeal, and, ultimately, in the United States Supreme Court.

Another argument frequently made against changing the present system is that the veterans themselves are happy with it and that the pressure for change comes from a few disgruntled veterans who are unhappy with the VA denials of their claims, and from lawyers who perceive an opportunity for enhancing their income if judicial review of VA claims is permitted.

The veterans who want the present system changed may be disgruntled, but they are not few in number. Their problem has been obtaining a forum or some spokesman for their predicaments. The Vietnam Veterans of America and Paralyzed Veterans of America have become an effective forum for such sentiments as have other organizations. The fact is that there are a substantial number of veterans who are extremely unhappy with a system which provides absolutely no hope for any judicial redress of perceived bureaucratic miscarriages of the law.

Contrary to the perception being generated by those opposed to any reform of the present system of non-reviewability, the lawyers who are most vigorous in urging reform are uninterested in the business of representing veterans. The American Bar Association approved resolutions supporting judicial review of VA decisions because they represent Association policy that no man or agency should be a judge in his own cause, and that no man or agency should be above the law. To be sure, in an appropriate case involving egregious injustice perpetrated by an erroneous application of law or denial of benefits, many attorneys would be agreeable to handling such a case. In fact, some have already done so on a purely pro bono basis, but none of us sees the change as in any way "lawyerizing" the day-to-day claims administration policy of the VA.

The assertion that most veterans are happy with the present system disregards the possibility that some veterans may have been denied benefits on impermissible grounds, as was true in the case of Mr. Thompson. See Thompson v. Gleason, 317 F.2d 901 (DC Cir 1962). If only one veteran is erroneously denied benefits provided him or her by a grateful Congress, I would say that we have a real problem. But take a worst case assumption: 10% of all undeserving claimants receive benefits because they are members of certain veterans organizations and have contributed time and effort to the management of such organizations, while 10% of all deserving claimants are denied benefits because they do not belong to such organizations and are looked upon by the service representatives and VA staff as "oddballs." We are not suggesting that this is the case, but are merely asking what would happen if it were. The 90% of deserving beneficiaries are not going to complain, nor are the 10% of undeserving beneficiaries. Therefore, it is hardly a legitimate measure of effective or efficient performance that the great majority of veterans are not displeased with the present arrangements. There still may be some who have been improperly denied.

In the past, some dire prophesies have been made about the number of filings which might be expected in the federal district courts if judicial review of veterans administration decisions is authorized. Those dire prophesies are exaggerated and misleading for the following reasons.

1. The number of filings rarely is an accurate measure of drain. Many cases routinely are remanded, or

withdrawn or settled for other reasons. Cases decided on the merits may be decided summarily, without trial and with lesser impact upon judicial manpower. J. Mashaw et al., Social Security Hearings and Appeals 129 (1978).

2. VA benefits decisions are not forged in the same trial-type crucible as Social Security benefits decisions, thus providing fewer technical or procedural grounds for judicial appeal. Social Security benefits decisions are subject to the trial-type procedures of 5 U.S.C. §§556 and 557. Judicial review would not require trial-type hearings to be conducted by the VA and there is nothing in S. 11 which would subject VA hearings to §§556 and 557.

3. Of the 23,000 claims rejected by the Board of Veterans during the year of 1981, 20,000 were rejections of routine appeals made without a hearing. If the claimant did not think his or her case important enough to request a hearing before the Board, it would not be likely that he or she would retain counsel and go to court.

4. The typical VA-rejected claim does not compare in severity to the typical Social Security-rejected

> disability claim. In Social Security the claimant's disability either prevents the claimant from engaging in a gainful occupation, or it does not. The claimant either receives disability benefits or is denied them. The vast majority of VA-rejected claims involve petitions seeking an upgrading of previously awarded percentage disability ratings. The veteran either gets a slight increase in his payments or continues to receive the amounts equivalent to the earlier established disability rating. The incentive to litigate here is considerably less.

Again, it is important to keep in mind what legislation which provides for judicial review of individual decisions of the VA Administrator will do and what it will not do. In the first place, it will only permit a veteran to petition a court for review--it does not require a court to readjudicate every claim denied by the Veterans' Administration. The practical result of this will be that most petitions for review will be denied. Courts, and particularly our federal courts, are not hungering for jurisdiction these days. Moreover, the extremely limited grounds upon which the Veterans' Administration decisions may be judicially questioned under legislation like S. 11 make it clear that it would be only the most obvious and exceptional departure from perceived congressional expectations which courts would be moved to review.

In the second place, permitting limited judicial review of Veterans' Administration decisions would not, as some have claimed, permit a judicial usurpation of congressional policy. What limited judicial review would do, however, would be to curtail bureaucratic usurpation of that congressional policy. If the persons subject to the power of government officials have no right to challenge any interpretation of the law which those officials may make, those officials have a tendency to make up their own law. What the officials create may be logically defended as beneficial and proper, but it may still not be what Congress has said the law _is_.

Finally, the current practice of making VA decisions on claims and benefits totally and completely beyond judicial challenge is just plain unAmerican. This is the reason why those veterans who discover this fact become so indignant about it. They fought for a country committed to the proposition that everyone is equal before the law and suddenly, in the administration of the benefits programs created for them by a grateful country, they find that they have no recourse at all if they have reason to believe that those programs are being administered in an unlawful manner.

At the present time the Veterans' Administration makes many reports and accounts to Congress and the appropriate Congressional Committees, but there are a growing number of veterans who believe that the Veterans' Administration is making low visibility decisions which are contrary to what the law requires. Whether these veterans are correct is not important. What is important is that they at least be given a chance to ask the courts to take a look. Courts would not be required to take that so-called "look," but they could if their preliminary appraisal suggests a blatant disregard of a congressional government expectancy. That is how we protect ourselves from abusive decisions by government officials--not by requiring courts to review every grievance, but by permitting them to do so if the think that a preliminary showing of illegality is of sufficient strength.

Your Committee currently has several proposals under consideration which provide for different degrees of and different forums for judicial review for veterans. We recognize and applaud the Committee's efforts in seeking a compromise which can be supported by the majority of veteran service organizations and has as its focus the improvement of justice under the law for each veteran.

The American Bar Association wishes to stress that in order to assure that our veterans receive the full amount of benefits due and authorized by a grateful Congress, any legislative compromise must authorize court review of the final decisions of the Administrator in matters involving individual claims for benefits under laws administered by the VA. We are deeply concerned by proposals which only allow a court to review the validity of a regulation promulgated by the VA Administrator.

There is a significant body of case law that suggests such court review currently is not precluded by 38 USC 211A and is therefore already available to veterans. We believe that statutory clarification of this right is beneficial, but it alone is insufficient. It does not make the VA answerable in a court of law for any individual decision regarding a veteran's claim for benefits. The aggrieved veteran still will have no meaningful access to the courts. If he or she believes, for example, that the VA did not properly apply the law, or that it acted arbitrarily or capriciously, or that it acted in excess of its statutory authority, the veteran still will have no way of asking a court to review his case. The veteran, for the most part, will be in no better a situation than he or she is right now. Only judicial review of individual benefit determination will provide veterans with meaningful access to the judicial system.

The American Bar Association also has been on record since 1977 as opposing statutory provisions which place arbitrary limitations on fees for legal services to be rendered before courts and administrative agencies.

Specifically on point, in August, 1977, the Association's House of Delegates adopted a resolution urging enactment of legislation which would repeal the limit of $10 on the fee which an attorney may charge for representing a client before the Veterans' Administration and provide reasonable fees for attorneys representing clients before the VA. (See Appendix C of this statement for a copy of the resolution).

The ABA believes that a person should be permitted to retain an attorney to present his or her VA case if he or she so desires. It is beyond dispute that the current $10 limitation effectively prohibits a veteran from retaining an attorney. The ABA believes the availability of attorneys can play an important role in highlighting areas of vagueness and excessive discretion and in promoting effective presentation of complex claims, e.g., the "service-connection" cases.

A liberalization of the fee restriction is clearly crucial to any meaningful judicial review. If an attorney cannot afford to take a meritorious VA case because of the $10 fee limitation, providing for judicial review would be an empty gesture. Lay service organization representatives are prohibited from practicing in district court, and veterans would be reluctant to attempt to represent themselves.

The notion that there is a horde of hungry lawyers avidly awaiting the repeal of the statutory limitations on fees for representing claimants against the Veterans' Administration, so that such lawyers can cash in on a lucrative law business, is simply not in accordance with the facts.

The American Bar Association opposes any rule which would require veterans to retain attorneys. We only seek freedom of choice. Specifically, claimants would be able to represent themselves, have a member of a service organization represent them at the administrative level or hire an attorney.

Some opponents of that policy argue that attorneys would take advantage of veterans. To the contrary, in the complex cases, particularly the "service-connection" cases, an attorney who is trained and skilled in gathering and presenting inconclusive and complex evidence to an administrative agency and building a record for possible appeal, may be the veteran's greatest asset. Moreover, every state has adopted a stringent code of professional conduct, similar to the ABA's Code of Professional Responsibility, which regulates the attorney in virtually every area of practice.

In conclusion, the American Bar Association fully supports the repeal of prohibitions against judicial review of decisions of the Veterans' Administration and vigorously supports every American's right to counsel. For this reason the ABA favors the removal of limitations on attorneys' fees.

The American Bar Association appreciates the opportunity to present its views on a subject of vital concern to veterans and of constitutional significance for all Americans.

Appendix A

RESOLUTION OF THE HOUSE OF DELEGATES
OF THE
AMERICAN BAR ASSOCIATION
ADOPTED 1958

Be It Resolved, That the American Bar Association supports the enactment of H.R. 272, 85th Congress, First Session, a bill to permit judicial review of decisions of the Administrator of Veterans' Affairs with a recommended amendment which would substitute review in the appropriate United States District Court for review in the appropriate Circuit Court of Appeals and that it authorize the Section of Administrative Law to appear before the committees of Congress and to take such other steps as it deems appropriate to carry out this resolution.

Appendix B

RESOLUTION OF THE HOUSE OF DELEGATES
OF THE
AMERICAN BAR ASSOCIATION
ADOPTED AUGUST, 1975

Be It Resolved, That the American Bar Association reaffirms its endorsement of the principle of judicial review of the decisions of the Administrator of Veterans' Affairs; and

Be It Further Resolved, That the President of the Association or his designee is hereby authorized publicly to urge enactment of this proposal of law.

APPENDIX C

RESOLUTION OF THE HOUSE OF DELEGATES
AMERICAN BAR ASSOCIATION
ADOPTED AUGUST, 1977

Resolved, that the American Bar Association recommends that the Congress adopt legislation:

1. Repealing 38 U.S.C. 3404(c)(2), which limits the fee which an attorney may charge for representing a client before the Veterans' Administration to $10.00;
2. Providing reasonable fees for attorneys who represent clients before the Veterans' Administration, based on the following considerations:
    - A. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
    - B. The likelihood, if apparent to the client, that the acceptance of the particular employment, would preclude other employment by the lawyer.
    - C. The fee customarily charged in the locality for similar legal services.
    - D. The amount involved and the results obtained.
    - E. The time limitations imposed by the client or by the circumstances.
    - F. The nature and length of the professional relationship with the client.

G. The experience, reputation, and ability of the lawyer or lawyers performing the services.

3. Providing that the client and the attorney shall determine the attorneys' fee, subject to approval by the Administrator of the Veterans' Administration and to review by the Federal district in which the claim is processed or in the Federal district court in Washington, D.C.

4. Nothing in this resolution shall be deemed to amend or modify Resolution #106(G), adopted by the House of Delegates in August, 1976.

— Federal Bar Association

STATEMENT OF JAMES T. BLAND, JR.
PRESIDENT, FEDERAL BAR ASSOCIATION

Before

COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES

On

S. 11, JUDICIAL REVIEW OF VETERANS ADMINISTRATION RULINGS

MR. CHAIRMAN and members of the Committee, the Federal Bar Association appreciates this opportunity to present its views to the Committee on its consideration of S. 11, Judicial Review of Veterans Administration Rulings. The appropriate, logical, and necessary role of law, the legal system, and lawyers in the important decision-making regarding veterans' claims has, for many years, been an important issue in the FBA.

For instance, five years ago, the National Council of the Federal Bar Association--our governing body--passed a resolution at the Association's Annual Meeting calling upon the Congress "to amend the laws to permit fair and reasonable attorney fees and to permit judicial review of decisions of the Veterans Administration." Then, over two years ago, the National Council unanimously passed a resolution calling upon the Veterans Administration to fill the "legal specialist" positions on VA Regional Rating Boards with lawyers and not merely with "occupational specialists." I will append both resolutions, as well as the report to the National Council in support of the latter resolution, to this statement for the convenience of this Committee. So, as the Committee can see, the fair treatment of our nation's veterans by the VA has, for some time, occupied our serious attention.

Much has been said before this Committee during these hearings and on other occasions about the real and perceived fairness of VA claim and rating decisions. There is little about our relations with the Veterans Administration these past few years which gives us confidence that the higher-ranking officials of the VA are personally or professionally dedicated to fairness and justice for the veterans whose affairs pass through their offices. Institutionally, those officials have been unresponsive to our approaches; and, individually, they have been stoical and inflexible in reacting to our suggestions that certain specific reforms might well further the fair treatment of their customers--this nation's military veterans--and, at the same time, would not adversely affect their internal operations.

We are sure, however, that other individuals, groups, and organizations have had more extensive and intensive relations with the Veterans Administration than we have. Accordingly, with this brief recitation of the history of our relationship with the higher-level VA officials, we will move to a discussion of an aspect of this larger issue with which we can more appropriately advise this Committee: the role of law, the legal system, and lawyers in a structure in which individuals' rights and privileges are at stake.

It may not legitimately be gainsaid that the decisions made by the Veterans Administration--whether by a hearing officer, a regional rating board, the Board of Veterans Appeals, or some other official or entity within that agency--are decisions of critical importance to the individuals of concern and to society as a whole. These men and women have put their very lives on the line for this country, and they served well and proudly in doing so. In turn, the Congress and the American people have decided that they deserve various entitlements, in return. If a veteran's right to those entitlements is determined by a system which is structured and operated in an inferior manner, then both that veteran and society are ill-served.

Neither may it be gainsaid that an inherent aspect of virtually all such decisions involves application of legal expertise. Presumably, that was the very reason why, for decades, the three-person regional rating boards were supposed to include a legal specialist, along with a medical specialist and an occupational specialist. Rather than live up to the spirit of this structural design, however, the VA has from the beginning viewed the legal specialist and occupational specialist positions interchangeably. Indeed, when last the

FBA gathered statistics on this question two years ago, only a small fraction of the legal specialist positions then were filled with lawyers.

In the early days, there was some legitimacy to the VA's contention that this was necessary because it was impossible to attract lawyer-applicants to what were then low-paying jobs (i.e. the GS-5 level). For years, though, that has not been the case: Today's rating board occupants, we understand, range in grade from GS-9 to GS-12 or 13. No other agency in the Federal government has difficulty attracting lawyers to fill vacancies at such levels, and we doubt that the VA would experience such difficulty, either, if it were to embark on a good-faith effort to do so.

If this Committee wishes, the FBA can at another time detail its frustrating relationship with the VA in an effort to fill these positions with lawyers, as originally was intended. I can tell you now, in summary, that the VA's response to our urgings was not in the high spirit that we would have hoped: Instead of acknowledging the important role of legal training and discipline to the board's role and, thus, placing a lawyer on each board, the VA instead undertook to redesignate the "legal specialist" positions into other "occupational specialist" positions. This dogmatic mentality only recently was reaffirmed when, without publication in the Federal Register, the VA implemented new hearing-examiner positions without any requirement whatsoever that applicants possess legal experience or training. This continues the disservice to our veterans and to society--and tellingly illustrates the deplorable insensitivity with which the high officials of the VA administer their trusted responsibilities.

But it is not only *within* their doors that the VA has succeeded in excluding the legal profession from performing its logical function. The combination of the statutory preclusion of legal review of VA decisions and the statutorily prescribed maximum fee of $10 for representing veterans in pursuing their claims before the VA absolutely ensures that no pair of legally trained eyes *outside* the VA's doors ever will focus on a veteran's claim, either.

The 1864 statutue which so limits fees (38 U.S.C. § 3404(c)(2)) has transformed a shield intended to protect the veteran and his family from overreaching by representatives into a sword pointed at the veteran's heart. What was a fair fee when set over 100 years ago now does one thing and one thing only: It ensures that no lawyer of competence, save those who from time to time become involved in this area on a *pro bono* basis, could afford to represent a veteran in his or her effort to obtain the rights and privileges to which he or she was entitled--an effort which, because of other artificial barriers exemplified by, but certainly not limited to, the VA's adamancy over placing lawyers in lawyer-like positions on regional rating boards and in hearing-examiner slots, too often must become a crusade for the deserving veteran.

And, if it were not enough that the VA has not ensured lawyers among the membership on rating boards as originally intended and has not required lawyers to fill what scream out as logical lawyer-like positions as hearing examiners--both of which result in the majority of claims going through the bureaucracy without a legally trained person looking at them--and if it were not enough also that, in this framework, the veteran as a practical matter is precluded from retaining a legally trained person to represent him in his quest for what rightly is his or hers, then comes the absurd final straw: No court, anywhere, has jurisdiction to review at all the decisions of the Veterans Administration. A classic triple whammy!

The Federal Bar Association does not contend before this Committee that lawyers are solutions to all problems. But lawyers do have a role in pursuing rights and in adjudicating possible disagreement over the extent of those rights. The legal profession is one composed of individuals whose training uniquely prepares them for the analysis and critical interpretation involved in matching a given fact situation to a set of laws and regulations, leading to a fair conclusion. It is an insult to an honorable profession, an insensitive slap in the face to our military veterans, and a real disservice to our society as a whole for the status quo to continue.

Accordingly, the Federal Bar Association calls upon this Committee and the entire Congress to address all three critical flaws in the structure and operation discussed. Attorneys, by training and discipline, have a critical contribution to make, both inside and outside of the walls of the VA, in resolving veterans' claims. Until lawyers are placed in lawyer-like positions on rating boards and as hearing examiners, until lawyers are free as a practical matter to help veterans perfect their claims for what justly is theirs, and until courts of law are available to review VA decisions which our veterans believe are wrong, then the system's integrity remains widly suspect. Our veterans deserve better--our country deserves better. The present system--triple-stacked against fairness and justice for a claimant--is a shame to us all.

RESOLUTION 83-7

Resolution
Calling for Code of Ethics
For Veterans Representatives

WHEREAS, Sections 3401-3405, Title 38, United States Code, requires representatives of veterans before the Board of Veterans Appeals and Veterans Administration to be recognized by the Administrator for preparation, presentation, or prosecution or any claim under laws administered by the Veterans Administration;

WHEREAS, the Administrator may require that veteran representatives and attorneys show that they are qualified to render claimants valuable service and are otherwise competent to assist claimants in presenting claims;

WHEREAS, in 1864 law, now codified at 38 U.S.C. §3404 (c)(2), permits the Veterans Administration's Administrator to determine and pay fees to agents and attorneys so long as such fees do not exceed $10.00 with respect to any one claim;

WHEREAS, the fee limitation was adopted originally by congress to protect the soldier and his family from unreasonable and unjust exactions on the part of agents who assumed to act in his interest and to protect a class of persons who were unusually unable to pay except for what was in 1864 a fair compensation for the labor necessary in obtaining a pension, and said law was designed to prevent beneficiaries from being over reached or defrauded by improvident bargains with unscrupulous persons in the prosecution of claims;

WHEREAS, judicial review is denied by statute, which denial is fundamentally unfair and unjust;

WHEREAS, application of this limitation works a hardship in depriving applicants of veterans aid of necessary and adequate representation;

BE IT THEREFORE RESOLVED, by the Federal BAr Association that it calls upon the Congress of the Untied States to amend the laws to permit fair and reasonable attorney fees and to permit judicial review of decisions of the Veterans Administration.

Adopted by the National Council
Of the Federal Bar Association
Louisville, Kentucky
September 24, 1983

Federal Bar Association

RESOLUTION 86-

UTILIZATION OF ATTORNEYS BY THE VETERANS ADMINISTRATION

Whereas, 38USC3404 limits attorney fees to $10.00 and effectively denies veterans use of lawyers, in presenting their claims to the Veterans Administration;

Whereas, courts are not open to veterans for judicial review of their cases under 38USC211A since appeals go to the Board of Veterans Appeals, Washington D.C.;

Whereas, the Veterans Administration bypasses use of legally trained persons by providing the substitution of so called occupational specialists for attorneys in making primary, amended and subsequent determinations;

Whereas, members of the bar could be employed in every state and are available to provide initial assistance to veterans;

Whereas, veterans benefits includes the cost of proper administration;

Now therefore, be it resolved, that the Federal Bar Association urges the Veterans Administration to provide attorneys for the V.A. Rating Boards;

And be it further resolved, that the President of the Association communicate the views of the Association to the Veterans Administration and other public officials, in the Executive and Legislative Branches of Government, and other interested persons, either personally or through his delegate.

Presented to the National Council of the Federal Bar Association,
Orlando, Florida, May 31, 1986

Report on the Utilization of Attorneys
By the Veterans Administration

A. Virtually every V.A. Beneficiary has to have a rating by the V.A. Rating Board consisting of a physician, a legal rating specialist and an occupational specialist before they are eligible to receive any monetary benefit or participate in a V.A. entitlement program. (Please see Report at B. on Title 38, United States Code for V.A . Benefits and Entitlement Programs.)

The Boards consider the military records of the veterans' relevant medical and lay evidence, difficult medical evaluations bearing on physical, psychiatric and mental disabilities based on injuries and diseases including date of onset, etc., which require making primary determination relative to the application and interpretation of the federal laws, regulations and administrative decisions. (Please see Report at C, for the details and scope of decisions.)

Action of the Board includes proper due process, briefing of the facts and law, in support of the decisions, writing of the statements of the case, hearings on appeal, etc.

The importance of the legal member of the Board cannot be over-emphasized as in almost every case, that is the only attorney who has had any input to the case through the entire rating procedure.

Title 38USC211A prohibits judicial review of V.A. disability determinations.

Since 1963, when the V.A. attempted unsuccessfully to hire attorneys at the GS-5 pay level, a change was made in the V.A. manual providing rating specialists, legal or occupational, may be substituted for each other which resulted in many ratings being made without the input or signature of an attorney and a reduced number of attorneys being employed for Rating Boards in V.A. Regional Offices.

38USC3404 provides any private attorney representing a veteran or beneficiary as a claimant, is entitled to a maximum attorney fee of $10.00 and it is only payable by the V.A. and only from any award of V.A. benefits. (Attorneys violating this fee standard are subject to severe sanctions under 38USC3405.) These sanctions effectively prevent private attorneys from representing V.A. claimants.

The V.A. budget calls for authorization of 27 billion dollars in V.A. programs, the great importance of attorney participation on individual rating decisions is underscored as it is obviously desirable, that the highest and best quality accuracy, justice and fairness be attained in administering V.A. benefits which affects entitlement to the 30,000,000 veterans their dependents in this country.

B. Title 38 United States Code encompasses V.A. Benefits and Entitlement Programs including the following:

a. Monthly monetary disability or death benefits for veterans, the spouse, children and parents. Many factors are considered to arrive at the various entitlements and the amount of benefits. These include whether the veteran is disabled, the degree or percentage of such disability, whether the disability or death arose out of military service and the financial needs of the various beneficiaries.

b. Monthly education benefits (the G.I. Bill) and educational loans for veterans and certain dependents pursuing vocational training or formal education.

c. Residential home loans. (G.I. Loans made direct by or guaranteed by the V.A.)

d. Eligibility for V.A. hospital, dental, domicilary or outpatient clinic care for veterans and certain dependents. In some cases, entitlement is a permanent basis and in some cases, a needs test must be met.

e. Special adapted housing, special adaptive equipment for automobiles and prosthetic services are available for certain seriously disabled veterans.

f. Other V.A. benefits available to qualified veterans include re-employment rights, veterans preference in employment, job assistance, training and counseling, certain burial benefits and possible burial in a national cemetery.

g. Certain benefits as provided by the particular states to certain veterans including residence in State Veterans Homes for Veterans, the spouse and children, reduced college tuition and reduced property taxes.

C. As previously mentioned, virtually every veteran must be rated by this board to establish entitlement and the amount or type of benefit available. Such ratings include determinations regarding:

a. Whether the type of discharge for military is a bar to benefits.

b. If entitled to service connected disability and degree of disability 10%, 20%, 30%, 40%, 50%, 60%, 70%, 80%, 90%, 100%. (The higher the percentage, the larger the benefit.)

c. Whether death is caused by a service connected disability.

d. Whether eligible veteran is permanently and totally disabled to be eligible for monthly pension.

e. Whether V.A. beneficiary is competent or incompetent to handle the monthly monetary benefit.

f. whether a child who reaches the age of majority is a "helpless child".

g. Whether the beneficiary is so disabled as to be "housebound." (Substantially confined to home, ward or clinic.)

h. Whether the beneficiary is so disabled as to be entitled to "aid and attendance" (so nearly helpless or blind as to require the regular aid and attendance of another person).

i. Whether the disability makes it impossible for the person to follow substantial gainful employment.

YALE LAW SCHOOL
NEW HAVEN, CONNECTICUT 06520

JERRY L. MASHAW
WILLIAM NELSON CROMWELL
Professor of Law

(203) 432-1671

August 26, 1988

The Honorable G. V. (Sonny) Montgomery
Chair, Committee on Veterans' Affairs
U.S. House of Representatives
335 Cannon House Office Building
Washington, D.C. 20515

Dear Chairman Montgomery:

I had been away from my office for several weeks and returned to find your invitation to testify on September 8, 1988. Unfortunately, it is not possible for me to be in Washington that week.

If I had more time, I would happily provide a statement for the hearing record. A quick review of the current proposals, however, confirms as your letter suggests, that the legislative situation has changed significantly since I appeared before your committee two years ago. The current crop of bills cover a number of topics, and each requires some careful thought and analysis. Other commitments make it impossible for me to give this legislation the attention it deserves. I, therefore, must decline to provide a statement.

I should add that I did provide a statement last spring, very much in the form of the statement that I made to your committee two years ago, pursuant to a general request by the Senate Committee's staff that I provide an opinion on the advisability of judicial review of veterans' claims. That much, at least, is now in the legislative record. As you will see if you care to peruse it in the Senate Hearings, my views have not changed since I testified before your committee.

I regret that I am unable to participate on this occasion and I appreciate your providing me the opportunity to comment on the current proposals.

Yours sincerely,

Jerry L. Mashaw

JLM/tmc

LANE EVANS
17TH DISTRICT, ILLINOIS

COMMITTEES
HOUSE ARMED SERVICES COMMITTEE
HOUSE COMMITTEE ON
VETERANS' AFFAIRS

Congress of the United States
House of Representatives
Washington, DC 20515

WASHINGTON OFFICE
[illegible] CANNON BUILDING
WASHINGTON, DC 20515
[illegible]

DISTRICT OFFICES
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MOLINE, IL [illegible]
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TOLL FREE: [illegible]
[illegible] EAST MAIN STREET
GALESBURG, IL 61401
[illegible]
MONMOUTH CITY HALL
SECOND FLOOR
MONMOUTH, IL [illegible]
[illegible] NORTH LAFAYETTE
MACOMB, IL [illegible]

September 28, 1988

The Honorable G. V. Montgomery
Chairman
COMMITTEE ON VETERANS' AFFAIRS
335 Cannon H.O.B.
Washington, DC 20515

Dear Sonny:

I would like to request that the enclosed letter from Oregon State Representative Mike Kopetski be included as part of the record for the recent hearing on judicial review.

Thank you for your assistance in this matter, and your continued leadership on behalf of our nation's veterans.

Sincerely,

Lane

LANE EVANS
Member of Congress

lb

MIKE KOPETSKI
MARION AND POLK COUNTIES
DISTRICT [illegible]

REPLY TO ADDRESS INDICATED:
☐ House of Representatives
Salem, Oregon 97310-1347
☐ [illegible]
Salem, Oregon [illegible]

COMMITTEE
Member
Joint Ways and Means

HOUSE OF REPRESENTATIVES
SALEM, OREGON
97310-1347

September 7, 1988

THE HONORABLE G.V. MONTGOMERY
United States Representative
Chairman, House Veterans' Affairs Committee
2184 Rayburn House Office Building
Washington, D.C. 20515

Dear Representative Montgomery:

In 1985, I had the high honor to chair the Oregon House Judiciary Committee subcommittee on Civil Law which heard HB 2769, the "Oregon Attorney Assistance Law." This law, the first of its kind in the nation, provided funding for the Oregon Department of Veterans' Affairs to assist combat veterans, former prisoners of war, veterans exposed to "Agent Orange" and veterans exposed to radiation in getting legal assistance for problems with the U.S. Veterans Administration.

Of eight cases so assisted, three have been successful for veterans and five have been denied. This percentage (three out of eight) is better than the nationwide average (one out of eight) in such cases. While this is good news, it is troublesome to realize that some twenty-five cases are still pending.

It has become apparent to all who will see clearly that the U.S. Veterans Administration has become the source of, rather than the solution to, problems that continue to plague veterans nationwide. Much of the problem stems from the astounding fact that veterans may not pursue claims against the Veterans Administration by going to court.

One of the fundamental complaint that led to the founding of this country in 1776 was the failure of the colonial government to allow its citizens to petition for redress of grievances. Two hundred years ago, fair-minded people saw this as a fundamental injustice.

It remains a fundamental injustice today.

September 7, 1988
Rep. Montgomery
page 2

On behalf of thousands of Oregon veterans, I therefore urge the committee to report out legislation to allow judicial review of claims against the U.S. Veterans Administration. This principle, a matter of simple justice, would allow veterans an opportunity to address a government agency for redress of grievances through the courts. This is the same fundamental right as millions of U.S. citizens have with all of the other government agencies.

When one considers that the Veterans Administration can sue veterans in court, and limit the individual attorney fees in such cases to $10.00, but can then turn around and deny the veteran the right to sue the V.A., the operation of the entire system is biased against the veterans.

This nation owes its veterans a duty that, as a minimum, includes fair treatment and access to all levels of government in seeking fair treatment. The very motto of the Veterans Administration, penned by Abraham Lincoln, states its purpose is "To care for him who has borne the battle, and for his widow and his orphans."

The Veterans Affairs Committee must do its duty, and provide for judicial review of Veterans Administration claims in U.S. District Courts.

Sincerely,

Mike Kopetski

MIKE KOPETSKI
State Representative

THE NON COMMISSIONED OFFICERS ASSOCIATION OF THE UNITED STATES OF AMERICA

"STRENGTH IN UNITY"

STATEMENT OF

Richard W. Johnson, Jr.
Director of Legislative Affairs

before the

Committee on Veterans' Affairs
U.S. House of Representatives

on

Judicial Review

September 8, 1988

NATIONAL CAPITAL OFFICE
225 N. Washington Street • Alexandria, VA 22314 • Tele: (703) 549-0311

The Non Commissioned Officers Association of the USA is grateful for this opportunity to comment on the several proposals under consideration to provide for Judicial Review of Veterans Administration regulations and benefit decisions. Among the four bills under consideration are S.11 the Senate passed "Veterans Administration Adjudication Procedure and Judicial Review Act" and H.R. 639, a similarly titled measure, both of which would provide comprehensive judicial review in U.S. District Courts. S.2292 another Senate proposal, simply titled the "Veterans Judicial Review Act," offers a kind of mini-judicial review while concurrently vesting the Board of Veterans' Appeals (BVA) with some new authority to review VA regulations. Finally, the committee is considering the "Veterans Reassurance Act of 1988", H.R. 5039, a judicial review substitute that essentially recasts the BVA as an independent executive body authorized to review VA determinations and regulations subject to subsequent Federal Appeals Court review. Unfortunately all of these bills raise unrealistic expectations for veterans awaiting the opportunity to take their benefit claims to court.

The importance of judicial review has been severely distorted by the contentious bickering of its proponents and opponents. The committee will not hear testimony about the thousands of veterans who will benefit from passage of judicial review, nor will it hear about 100 veterans or even one veteran who will benefit. Yet the hopes of thousands will be raised by the unrealistic expectation that a day in court will bring them justice as they preceive it. Therein is the deficit of judicial review. Veterans aren't waiting for real justice - they are waiting for different justice - a promise not likely to be fulfilled for most who appeal VA decisions. But they will nevertheless embark on a long, expensive journey with little promise of success if judicial review is adopted.

NCOA Position

The Non Commissioned Officers Association continues to oppose judicial review. NCOA believes judicial review will eventually destroy the non-adversial review process which currently exists to resolve veterans' claims. The association is also concerned about "compromise" proposals which would vest BVA with new authority to oversee VA activities.

There is not another agency in government whose operations are subject to the kind of review authority proposed for the BVA. NCOA agrees with efforts to make the BVA more independent, but does not agree with granting it additional and unprecedented powers of review over the VA. Such an action would be clearly inconsistent with on-going efforts to elevate the VA to Cabinet status and would seriously jeopardize the ability of the VA to act independently.

Accordingly, NCOA is opposed to the enactment of any of the bills currently under consideration by the committee.

NCOA Alternative

U.S. District Courts throughout this Nation are overburdened with both civil and criminal actions. NCOA has grave reservations about the ability of district courts to be responsive to veterans needs. District courts lack a frame of reference in veterans issues and the traditional relationships between the veterans and the VA. Additionally, it would not be unfair to say that district courts lack the expertise and understanding to deal with most veterans issues. And, those who believe timely consideration of cases is lacking at BVA will be even more sadly disappointed in their attempts to get a case through a district court where cases may pend for years. Moreover, because of the number of district courts, uniformity in decisions will suffer tremendously.

NCOA is steadfast in its opposition to judicial review as currently proposed but the Association is not blind to the possibility of its passage. Thus, if our arguments against these proposals are not compelling, then the Association urges a different approach to providing judicial review. The Association suggests the creation of a Court of Veterans' Appeals, existing as an independent and well focused judicial body similar to the Court of Military Appeals. Such a court would be more capable of developing the special talent needed to provide uniformity in decisions and timeliness of case consideration.

The BVA's roll as independent adjudicator is sufficient to cope with the review of all but the most unusual cases. Its balanced approach to resolution of claims will likely produce few cases needing judicial review. As a result, NCOA believes a three to five member judicial body could easily cope with any judicial questions arising from challenges to VA regulations or benefit decisions left unsatisfactorily resolved at BVA. Moreover, such a well focused court could easily be relied upon to preserve the integrity and uniformity of decisions which all veterans have a right to expect and receive.

Conclusion

In summary NCOA remains opposed to the current proposal for judicial review. However, the association would support legislation which retains the Board of Veterans' Appeals while creating a judicial body - a Court of Veterans' Appeals - as an exclusive and independent adjudicator of VA rule and benefit decisions.

STATEMENT OF

NOEL C. WOOSLEY
AMVETS NATIONAL SERVICE DIRECTOR

Before The

COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES

On

Judicial Review
H.R. 639, H.R. 5039, S. 11, S. 2292

9:30 a.m., September 8, 1988
Room 334, Cannon House Office Building

Mr. Chairman and members of the Committee:

AMVETS thanks you for the opportunity to present our views on judicial review of decisions by the Veterans Administration (VA) and attorney's fees as relate to the VA claims process.

The subject of judicial review has become an emotionally charged issue which now appears to be a raging fire of controversy, with many who are more than willing to add whatever fuel is available to keep the fire burning. We hope that this Committee and the Congress as a whole will not be consumed by the flames of this fire and allow America's veterans to get burned.

The controversy over the issue was very apparent during our recent National Convention held in Albuquerque, New Mexico, where the debate over judicial review and attorney's fees was, what appeared at times to be a mini-battle field. However, after much heated discussion, both pro and con, the convention body did pass several resolutions which dramatically altered our position on judicial review.

Resolution #41 passed by the National Convention body, received far more delegate support than Resolution #111, copies of which are appended to this statement for your consideration.

The reason Resolution #41 received greater support was the fact that it called for an impartial study of the current Veterans

Administration appeals process to determine once and for all whether, and to what extent and manner, judicial review of the Board of Veterans Appeals decision should be permitted.

We have watched and listened over the past decade as the controversy with respect to judicial review has grown to such a disproportionate magnitude that there were those who would have jeopardized the legislation elevating the VA to cabinet level status if judicial review was not included.

Mr. Chairman, members of the Committee, are we here today to fix something that isn't broken? AMVETS believes that the proponents of judicial review and those who are adamantly opposed, would be well served by an independent study performed by an impartial congressionally selected group. Then, if in fact something is broken, we will be able to effect the correct repairs in the correct places. We should like to point out that while our national position on the subject of judicial review has changed, AMVETS must be sure that any modification of the current system be structured so as to better serve our nation's veterans.

Today's hearings are focused on four bills: H.R. 693; H.R. 5039; S. 11; and, S. 2292. I will therefore, focus my remaining remarks on these pieces of legislation being considered here today.

Based on the aforementioned resolutions, (41 & 111) AMVETS has been mandated to support judicial review. However, our mandate is quite clear in that only questions of law, regulations and VA rules would be subject to review by the Federal Courts and/or at the Board of Veterans Appeals. S. 11 and H.R. 639 in their current form are therefore totally unacceptable and AMVETS wishes to go on record as being opposed to the passage of S. 11 or H.R. 639 as now proposed.

With respect to H.R. 5039, AMVETS could be supportive of many of the legislative initiatives outlined therein, but feel some fine tuning would be required before a total commitment of support was in order. One area of H.R. 5039 that we hope will be included in any new or revised bill on judicial review is the area of liability in connection with claims for benefits found on pages 9 and 10 of said bill.

After much review and deliberation it is apparent that a bill that would find all parties marching to the tune of the same drum will not be forthcoming in any shape or form. With this in mind and based on the action taken at our recent national convention, it would appear that S. 2292 would most closely be in keeping with the wishes of our membership. Fully realizing that S. 2292 is not and should not be perceived as a panacea with respect to the issue of judicial review, AMVETS would prefer and support S. 2292 as currently the most preferable pending proposal to resolve the long standing dilemma of judicial review.

This concludes my remarks and AMVETS thanks you again for this opportunity to voice our views.

RESOLUTION NO: 111

SUBJECT: Validity of VA Rules

WHEREAS current law, Section 211(a) of Title 38, U.S. Code, empowers the Veterans Administration to finalize all decisions on individual benefit claims, in most instances thereby, precluding review of such matters by any other entity; and

WHEREAS VA claimants can obtain federal court consideration and review of a Constitutional claim -- that a VA benefit decision violated their due process, equal protection or First Amendment rights; and

WHEREAS some Federal District Courts have also assumed jurisdiction of challenges to certain VA rules and/or the VA rulemaking process even where no Constitutional rights are at issue; and

WHEREAS the opportunity to challenge the validity of a VA rule, or the process by which the rule was promulgated, would add protection for Congressional intent of statutorily established programs and benefits and would not unduly disrupt the adjudication of individual claims; now therefore,

BE IT RESOLVED that AMVETS supports the enactment of legislation to provide for the review of the validity of VA rules and the VA rulemaking process in the federal courts and the opportunity to challenge the validity of a VA rule at the Board of Veterans Appeals; and

BE IT FURTHER RESOLVED such review may not challenge any provision in, or affecting the substantive terms of, the VA Schedule for Rating Disabilities.

RESOLUTION NO: 41

SUBJECT: JUDICIAL REVIEW

WHEREAS section 211(a), Title 38, United States Code provides that decisions of the Administrator of Veterans Affairs on any question of fact or law under any statute administered by the benefits for veterans, their dependents and survivors are final and conclusive and not reviewable by any other official or court of the United States; and

WHEREAS this provision effectively denies veterans and their beneficiaries the same rights to judicial review possessed by individuals in pursuit of entitlements under programs administered by other federal agencies; and

WHEREAS AMVETS traditionally supported judicial review with respect to questions of law and regulation; and

WHEREAS the Congress has conducted numerous hearings to ascertain the position of the many involved parties concerning whether, and to what extent there should be judicial review of Veterans Administration's decisions; and

WHEREAS this issue has caused much controversy, raising many varied and diverse positions among veterans, the veterans service organization and the V.A., concerning whether, and to what extent, judicial review should be implemented; and

WHEREAS AMVETS recognizing its responsibility to the veterans of this great nation and their dependents, while further recognizing the significance and possible impact of the introduction of judicial review, must again urge Congress to Continue its examination of this apparent inequity in the VA's appeals process; now, therefore

BE IT RESOLVED, by AMVETS, that we reiterate our support for judicial review of questions of law and regulation and support a thorough and impartial study of the current Veterans Administration's appeals process to determine once and for all whether ,and to what extent and manner, judicial review of the Board of Veterans Appeals' decision should be permitted.

RESOLUTION NO: 114

SUBJECT: Ten Dollar Attorney Fee

WHEREAS Section 3404(c), Title 38, U.S. Code prohibits an attorney from receiving a fee in excess of $10 for successfully representing an individual claims for monetary benefits before the Veterans Administration; and

WHEREAS it has been commonly held that the $10 fee, when introduced in 1864, was intended to protect veterans from unscrupulous attorneys while, at the same time, was considered a reasonable fee based on the then current economy and thus permitted veterans to obtain the services of reputable lawyers to assist in the prosecution of their claims; and

WHEREAS the constraint imposed by Section 3404(c) is, in today's economy, an effective bar to the exercise of the fundamental freedom of choice and seriously infringes on due process of law; and

WHEREAS although the Supreme Court of the United States in a ruling in June 1985 in the case of Walters vs. National Association of Radiation Survivors, upheld the constitutionality of Section 3404(c), such action does not bar nor otherwise restrict the Congress of the United States from amending Title 38, by removing the $10 fee in favor of a reasonable attorney fee schedule; and

WHEREAS there has not been presented acceptable evidence that the Veterans Administration would incur substantial cost increases through the emergence of attorneys as representatives, nor has it been shown that greater participation by attorneys will significantly alter what is viewed as an informal claims procedures; but if the opposite were true, it should not outweigh an individual's right to select a representative of his/her choice, a right which should be enjoyed by all, especially those who fought on the field of battle for its very preservation; now therefore,

BE IT RESOLVED, by AMVETS, that we support legislation to amend Section 3404(c), Title 38, U.S. Code, by replacing the $10 fee with a reasonable attorney fee schedule established by Congress; and

BE IT FURTHER RESOLVED that as with the current provision of Section 3404(c), monetary payment of attorney fees would be contingent on successful resolution of claim.

STATEMENT BEFORE
HOUSE VETERANS AFFAIRS COMMITTEE

HEARING ON
JUDICIAL REVIEW
8 SEP 88

SUBMITTED BY
AMERICAN EX-PRISONERS OF WAR

ALBERT J. BLAND
NATIONAL COMMANDER

Written Statement by American ex-Prisoners of War

The American Ex-Prisoners of War have recognized for some years that the Veterans Administration lacked the ability to police its own adjudication and appeals actions, and, as with almost everything in our daily lives, some sort of judicial review would probably be necessary. This recognition became apparent if we were to ensure that benefits and services are administered within the intent of Congress, and the enabling statutes, and from the standpoint of promoting a public trust in the overall fairness of the Veterans Administratrion claims process.

Therefore, based upon discussions within our Board of Directors since our national convention, we are now supporting an alternate approach to judicial review. That approach is most nearly embodied in H.R. 5039 introduced by Congressman Montgomery and S.2292 introduced by Senator Murkowski. Within each of these bills is the means to effect judicial redress in a broad meaningful manner which would affect large numbers of claims, without bogging our courts down with large numbers of individual claims, and creating an adversarial approach.

We believe one additional benefit would be gained, and that is that the Board of Veterans Appeals would then function without the appearance of undue agency influence.

The American Ex-Prisoners of War view the combination of H.R. 5039 and S.2292 as a viable alternative to past judicial review proposals that have thus far failed to achieve consensus in the Congress.

These bills (H.R. 5039 and S.2292) represent an opportunity to finally address the complex issue of judicial review in a manner where all would benefit.

Statement of
Raymond J. Williams
National Service Officer
Catholic War Veterans of the U.S.A.
Before the
Committee on Veteran Affairs
House of Representatives
September 8, 1988

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

On behalf of the members of the Catholic War Veterans of the U.S.A. and its Auxiliary we appreciate the opportunity to make a brief statement to express our views on the proposed legislation to grant judicial review of decisions by the Veterans Administration (VA) and to address the matter of attorney's fees for services rendered to veterans inthe presentation of claims to the VA.

As you are so well aware, the subject of judicial review is a matter which has been debated pro and con for many years. We recognize the excellent work the veteran service representatives have provided over the years to many veterans in the presentation of claims to the VA. The Catholic War Veterans have, within the limits of their capability, rendered assistance to veterans, their dependents and survivors in filing, developing and presenting claims for benefits to the VA without cost and without regard to membership in our organization.

Our veterans' benefit system is and always has been a valuable national asset, one of tremendous importance to all Americans and our country. The Catholic War Veterans have a strong and abiding interest in the welfare of our nation's veterans, their dependents and survivors and to the benefits which the Congress has granted to those who have served their country.

We feel that the present VA system for processing claims and appeals has, with a few notable exceptions, been satisfactory. The system provides for the presentation of claims without cost to the veteran and presents a great latitude of informality in the presentation of evidence in a non-adversarial proceedings.

At the recent National Convention of the Catholic War Veterans the delegates unanimously approved a resolution supporting legislation providing for judicial review of veteran claims. The members were of the opinion that a veteran whose claim has been denied by the Board of Veteran Appeals (BVA) and who feels that current laws, policies and procedures have not been properly considered or applied to the facts of his case and the evidence of record should have authority to appeal such decision to the Federal Court system.

Although the veteran has for many years had the right to seek judicial review of any VA decision which might violate a constitutional right, we feel that the veteran should have authority to seek judicial review of all VA rules.

regulations and policies governing the extension of VA benefits and services as applied to his claim. We feel that the right to seek such judicial review should be authorized after the veteran has gone through the normal appeal procedure provided by the BVA. We believe that a veteran should be guaranteed the fundamental right to appeal to the Federal Court the denial of benefits or services to which he or she feels entitled under the law.

We believe that it would be beneficial to the Government as well as the veteran if a single court, like the U.S. Court of Claims, could be given jurisdiction to consider cases involving veteran claims. Such a single court could develop some expertise in handling such cases and establish policy, precedent and case law which would be helpful to both the veteran and the government.

We do not feel that the overcrowding of the court docket with veteran claims will necessarily occur. There is a small percentage of claims which are denied by the VA which are appealed to the BVA. Similarily, we believe that a very small percentage of those denied by the BVA will pursue their claim in the Federal Courts. This assumption is based on the experience with the congressionally established military Discharge Review Boards (10 USC 1553) and Boards for Correction of Military Records (10 USC 1552). Congress did not restrict the applicants to such boards from appealing an adverse decision to the Federal Courts; however, very few of the claims denied by such Boards are appealed.

Also, we believe that the BVA should have a greater degree of independence or autonomy. We feel that the BVA is too closely tied to the VA. The veteran perceives the BVA as a part of the Agency which denied his claim initially and not as an impartial decisionmaker and that an appeal will only result in an affirmation of the denial of his claim.

We feel that a veteran who determines to retain an attorney to represnt him and to assist in the presentation of a claim in a judicial proceedings should be permitted to pay reasonable attorney fees for such service. We feel it would be entirely appropriate for the Congress to establish a reasonable limit on the fee the veteran may pay.

Mr. Chairman and members of the Committee we thank you very much for extending to our organization this opportunity to express our views on this most significant legislation. We recognize that there is a divergence of views within the veteran's community on this controversial subject. We feel that the time has come for the Committee to favorably consider and the Congres to enact legislation giving the veteran an opportunity to seek judicial review and to pay reasonable attorney fees.

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